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Book Review

Anchors and Flotsam: Is Evidence Law “Adrift”?

Evidence Law Adrift. By Mirjan R. Damaška. New Haven: Yale University Press, 1997. Pp. x, 160. \$27.50.

Richard D. Friedman[†]

Difference, as well as distance, yields perspective. A comparison of legal systems may search for common underlying principles, or for lessons that one system might learn from another. But it may also be aimed primarily at illuminating one system by light shed from another. This is the aim of *Evidence Law Adrift*,¹ Mirjan Damaška's elegant study of the common law system of evidence, and he is ideally suited for the task. Born and schooled in Continental Europe, he has lived and taught in the United States for twenty-five years. His relation to the common law system of evidence is, I suspect, much like his relation to the English language: He has come to both relatively late, bringing with him a distinctively European sensibility. Consequently, rather like the person who speaks a foreign language with painfully correct grammar, he may take the rhetoric of Anglo-American evidence law somewhat too seriously. But in most respects he is as much a master of the evidentiary system of the common law as he is of its language, which is saying a great deal. Although Damaška disclaims an ambition to “break much new ground”² or offer “great epiphanies,”³ he hopes that his “comparative looking glass”⁴ will unveil “unfamiliar horizons.”⁵ He succeeds very well.

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1. MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* (1997).

2. *Id.* at 6.

3. *Id.*

4. *Id.* at 5.

5. *Id.* at 6.

Indeed, all in all this is an excellent book. It is brief, enormously broad in scope, and very specific in its attention to a multitude of issues. Writing a book with two of these traits is not particularly difficult, but getting all three together is exceedingly so. Damaška succeeds in part because his writing, while marked by great flair, is quite terse. He sprinkles the page with metaphors and, rather too liberally, foreign language phrases. But these do not take up too much space, and he exercises excellent judgment in including no more detail than is necessary to make his points. He has a nice touch for briefly and lucidly summarizing major procedural systems, differences, and trends. The result is a book that is rich and concentrated without feeling dense; it can be read quickly, but it rewards close, note-taking, margin-filling study.

So just imagine what nice things I might say if I agreed with more of Damaška's main argument. Damaška identifies three features of the common law evidentiary system that, from a Continental perspective, stand out as characteristic: "the complexity of common law regulation; a preoccupation with sifting the material for the factfinder to hear and see; and an aspiration to structure the analysis of evidence."⁶ He then analyzes in considerable depth three "supporting pillar[s]"⁷ of the system, which he believes account in large part for these features. These pillars are "the peculiar organization of the trial court; the temporal concentration of proceedings; and the prominent roles of the parties and their counsel in legal proceedings."⁸ According to Damaška, "[c]racks have . . . appeared in all three."⁹ The lay jury, the most distinctive aspect of the Anglo-American trial court, is shrinking in importance;¹⁰ greatly expanded discovery procedures have lessened the degree of temporal concentration in legal proceedings;¹¹ and even the adversary system, which relies heavily on the parties and their counsel to discover, assemble, and present evidence, is undergoing strain as both the role of the judge and the consequences of litigation to third parties become greater.¹² Because they undermine the rationale for much of evidentiary law, these "changes of the institutional milieu"¹³ are responsible in large part for the recent surge of evidentiary reforms throughout the common law world. They are also responsible for a general state of dissatisfaction: "[D]octrines and practices heretofore invested with meaning now increasingly appear as mere technicalities—legal rituals devoid of deeper sense."¹⁴

6. *Id.* at 8.

7. *Id.* at 4.

8. *Id.*

9. *Id.* at 6.

10. *See id.* at 126-29.

11. *See id.* at 129-34.

12. *See id.* at 134-39.

13. *Id.* at 6.

14. *Id.*

Though a historian of great breadth and ability,¹⁵ Damaška consciously takes a primarily analytical, rather than historical, approach in *Evidence Law Adrift*.¹⁶ He analyzes his three supporting pillars at some length, but in a rather time-detached way; the pillars do not stand today as he first describes them, and only toward the end of the book does he address how recent changes undermine them.¹⁷ The structure makes the book readily accessible, but it does have flaws. It suggests that there is a static thing, the classical common law of evidence, that fit the institutions of an earlier day, but that those institutions have now changed. In fact, the picture is far more dynamic; the institutions have always been in flux and so too (whether in good time or not is another matter) has the law of evidence. The book's structure also shrouds values of enduring importance that come into sharper relief when viewed over a perspective of time.

I would not think of challenging Damaška on how the Anglo-American system appears from a Continental perspective, but I can assess whether his description accurately captures the system with which I am familiar. In Part I of this Review, therefore, I discuss two of the features that Damaška identifies as characteristic of the common law system of evidence:¹⁸ its tendency to limit the evidence available to the factfinder, and its goal of structuring the analysis that the factfinder performs. I believe his characterization is accurate in some respects but not in others. In analyzing the first characteristic, I generally place less weight than Damaška does on the goal of ensuring factual accuracy. And, regarding the second characteristic, I believe that the picture Damaška presents is considerably overdrawn.

More broadly, I believe that Damaška's description of the common law system is incomplete. Thus, in Part II, I temporarily take the agenda from Damaška, turning to certain aspects of the common law system that I believe he underemphasizes and that explain a great deal of Anglo-American evidentiary law. I discuss especially the significance of a concept of individual rights that—especially in its American variant and especially as it favors a criminal accused—is different from, and generally stronger than, its counterpart in Continental systems. An ideological commitment to individual rights is crucial not only to many common law evidentiary doctrines, but also to the institutional factors that lie at the heart of Damaška's study. I also discuss two

15. See, e.g., MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 29-46 (1986); Mirjan R. Damaška, *Hearsay in Cinquecento Italy*, in 1 *STUDI IN ONORE DI VITTORIO DENTI* 59 (Michele Taruffo ed., 1994).

16. See DAMAŠKA, *supra* note 1, at 3 (describing the difference between historical and analytical approaches and stating that his approach "will be predominantly analytical and interpretive").

17. See *id.* at 126-42.

18. Throughout this Review, I refer, as does Damaška, to the common law or Anglo-American system. Except in historical discussion, however, my principal focus will be on the American variant of that system, the variant I know best and the one that probably adheres most closely to the traditions of the Anglo-American system. See *infra* text accompanying note 145 (discussing the American retention of trial by jury in civil litigation).

other factors that are to some extent subsidiary to this rights orientation: the Anglo-American tendency to legalize evidentiary issues, seeking to the extent feasible uniform results across cases; and an intellectual style that values analytical soundness far more than it does theoretical or practical simplicity.

In Part III, I return to Damaška's agenda, examining the institutional pillars on which he concentrates. I believe the factors I discuss in Part II, especially the Anglo-American system's individual rights orientation, help to explain both much of the common law system of evidence and, to a significant extent, the institutional pillars themselves. Indeed, I suggest that the institutions cannot be taken as exogenous, or prior to, the system; on the contrary, if the institutions do not serve the values expressed in the larger system, they will tend to change over the long term. Thus, I contend that, although Damaška's perceptions are insightful, he accords somewhat too much weight to the institutional pillars. Even if the pillars were removed altogether, there would still be solid grounds—rooted especially in its individual rights orientation—for much of the Anglo-American law of evidence.

Part IV addresses the prospects for future change that Damaška discusses. Damaška is presumably correct that institutional changes will help to cause doctrinal changes. But this is neither a recent development, nor one that should be feared. Indeed, to some extent, evidence law always has been, and always should be, "adrift"; at the same time, the individual rights orientation of the common law system has for centuries acted as an anchor for evidentiary and procedural law. Accordingly, I suspect that the current institutional changes that Damaška addresses will be less drastic and have less impact than Damaška believes. And that is as it should be. Some aspects of evidentiary law correspond to our deeply held notions of the rights of individuals and are worth preserving.

I. CHARACTERISTIC FEATURES AS VIEWED FROM WITHOUT

In this part, I analyze two of the features that Damaška identifies as characteristic of the Anglo-American system: its "preoccupation with sifting the material for the factfinder to hear and see" and its "aspiration to structure the analysis of evidence."¹⁹ I agree with him that the Anglo-American system

19. DAMAŠKA, *supra* note 1, at 8. I postpone to other portions of this Review most of my discussion of the first feature that Damaška identifies, namely, the complexity of regulation. See *infra* Section III.A. The aspect of complexity that Damaška finds most significant is what he calls the technical character of the common law system: its departure from ordinary methods of factual inquiry in social practice. See DAMAŠKA, *supra* note 1, at 11-12. This does indeed seem to be a principal characteristic of the common law system, and, as Damaška says, it provides one of the recurrent themes of his book. See *id.*

Another aspect of complexity is the volume of Anglo-American evidentiary law—"the sheer mass of evidentiary rules." *Id.* at 8. But Damaška goes to some length to show that "[o]n this dimension, the contrast between Anglo-American and Continental systems is grossly overstated." *Id.* While deferring to Damaška in his description of the Continental system, I believe that the common law system does aspire to doctrinalize—to articulate in rules—a great deal of evidentiary law and to protect a range of policy goals

has a strong prophylactic orientation, although I cast that orientation somewhat differently. I disagree for the most part with his assertion that the common law system aspires to structure the factfinder's analysis of evidence.

A. *Prophylactic Orientation*

As Damaška indicates, "Virtually all observers agree that the intense preliminary screening of evidence constitutes a salient trait of the Anglo-American factfinding style."²⁰ Damaška believes that the perceived difference between systems in this respect is "a gross exaggeration,"²¹ and he shows that extrinsic evidentiary rules—those "rejecting probative information for the sake of values unrelated to the pursuit of truth"²²—are present in the Continental system as well. Yet, he does not dispel the idea that such rules are generally more pervasive and significantly stronger, both in consequences and in probability of gaining compliance, in the common law world than in Continental Europe.²³

Damaška contends that "only a small subset of exclusionary rules is truly idiomatic to the common law"²⁴—intrinsic rules, "those that reject probative information . . . on the belief that its elimination will enhance the accuracy of factfinding."²⁵ Damaška discusses three types of such rules: rules barring evidence because of its slight probative value; rules barring evidence that would be overestimated by the factfinder; and rules barring evidence that would predispose the factfinder to a particular verdict.²⁶ These rules implicate substantially different issues. Indeed, they are better thought of as separate considerations that may, taken together, favor exclusion. I believe, contrary to

through that doctrine. This aspiration helps to explain an aspect of complexity that Damaška finds more salient: the appearance that evidentiary law is "a maze of disconnected rules, embroidered by exceptions and followed by exceptions to exceptions." *Id.* at 10. Damaška concedes that the recent trend toward codification has greatly reduced this aspect of the common law system. *See id.*

20. DAMAŠKA, *supra* note 1, at 12.

21. *Id.*

22. *Id.*

23. One example of a Continental exclusionary rule that Damaška cites is testimonial privilege, which, he argues, is broader in some Germanic jurisdictions (but apparently not in Romance jurisdictions) than in the common law. *See id.* at 12-13 & n.14. A privilege, however, is different from most exclusionary rules. It is a right to *withhold* evidence, in essence preventing its creation; it is not a rule *excluding* evidence that a party (or the court) is willing and, without resort to compulsory means, able to present. Damaška also mentions rules prohibiting the use of illegally obtained evidence, but he acknowledges that these rules are less stringent in the Continental system than in the American system. *See id.* at 13-14. Moreover, he doubts that even those Continental jurisdictions that have formally adopted exclusionary rules will enforce them vigorously. *See id.* at 14 n.19. Damaška does not suggest that rules comparable to those exclusionary rules in the Federal Rules of Evidence that are based very largely on extrinsic policy concerns, *see, e.g.*, FED. R. EVID. 407-410 (excluding, *inter alia*, evidence of subsequent remedial measures, efforts to compromise a claim, offers to pay medical fees in injury cases, and plea discussions, respectively), are present in any force in Continental Europe.

24. DAMAŠKA, *supra* note 1, at 12.

25. *Id.* at 14.

26. *See id.* at 14-17.

Damaška's view, that two of them are not primarily oriented toward factual accuracy as such; moreover, the list fails to include one type of rule that *is* so oriented.

1. *Slight Probative Value*

First, Damaška points out correctly that it is daily routine in the common law to reject evidence on the ground that its probative value is too slight, a practice virtually unknown in the Continental system.²⁷ If the only downside of admitting the evidence is wasting time and resources, however, exclusion is not actually motivated by a desire to improve factual accuracy. Instead, the need to prevent the parties in an adversarial system from unduly lengthening trials, especially in a context of overburdened dockets, adequately explains the common law tendency.

2. *Overestimation by the Factfinder*

Damaška articulates separately, but does not sharply distinguish between, two other types of rules: those rejecting probative material because its value might be overestimated by the factfinder and those rejecting probative material because its value is overshadowed by "its capacity to unfairly predispose the trier of fact toward a particular outcome."²⁸

The rule against hearsay is the most prominent of the rules often justified on the first basis, that is, the fear that the factfinder will overestimate the value of evidence.²⁹ This fear genuinely seems to stem from a desire to ensure factual accuracy. But, as Damaška points out in another context, the fear is unfounded in many of the evidentiary contexts in which it arises, including the rule against hearsay.³⁰ There is no good reason to conclude, as a general matter, that a jury will overvalue hearsay evidence to such an extent that its admission is more likely to impede than to assist the truth-determining process. Indeed, as Damaška points out, the empirical evidence that exists on this score points in the other direction.³¹ Moreover, concerns regarding juror overestimation of evidence seem to have become prominent rather late in the history of the common law—well into the nineteenth century and well after exclusionary rules had taken

27. See *id.* at 14-15; see also, e.g., FED. R. EVID. 403 (providing for exclusion on this ground); David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1, 9-20 (1997) (arguing that the definition of relevance under the Federal Rules of Evidence is extremely broad, and that Rule 403 does not provide sufficient guidance as to when evidence of minimal probative value should be excluded).

28. DAMAŠKA, *supra* note 1, at 15.

29. See *id.*

30. See *id.* at 28-33.

31. See *id.* at 31 n.10 (citing studies supporting the conclusion that jurors tend to attribute little weight to hearsay).

firm footing.³² Much of the rhetoric of common law discourse concerns the possibility of overestimation, but it is unlikely that this possibility ever genuinely provided a ground for broad exclusion of probative material.

3. *Bias*

The possibility that evidence will bias, or predispose, the factfinder in one direction—a concern that weighs most heavily with respect to evidence of prior misconduct³³—seems not to be principally concerned with factual accuracy. One could say that such evidence would create a filter distorting the reception of other evidence, and this may be the way Damaška views the common law resistance to evidence of prior misconduct.³⁴ But this concern is barely distinguishable from that regarding overestimation, and is subject to the same skeptical critique. A factfinder who, in trying to determine a person's conduct on a given occasion, accords substantial probative value to the person's prior conduct is probably acting perfectly rationally.³⁵ Indeed, there is no good reason to believe that such evidence will tend to lead the factfinder away from, rather than toward, the truth.³⁶ The real concern is that evidence of this type will bias the factfinder to resolve doubts in a way that the system deems inappropriate, or that it will compel the factfinder to issue a knowingly false finding to punish the disfavored party. In this view, the real reason for exclusion of this evidence is to protect the standard of persuasion and, to some

32. See Edmund M. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 1, 36 (1942). In a separate article, Morgan reviews the long history of the oath requirement, writing that “[i]t was insisted upon, not because of any supposed incapacity of the trier to evaluate unsworn testimony, but because of its effect upon the mind and emotions of the witness.” Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 182 (1948). Furthermore, he states that

[b]efore the opening of the eighteenth century . . . we find three reasons advanced for excluding hearsay. The court and jury must base their findings upon what the witness knows and not upon what he is credulous enough to believe; the witness must make that knowledge known under sanction of fear of the consequences which falsehood will bring; and the adversary must have an opportunity to cross-examine. There is no suggestion that any one of these is less necessary where the trier is a court than where there is a jury.

Id. at 182-83.

33. See FED. R. EVID. 404(a) (excluding, subject to limited exceptions, “[e]vidence of a person’s character or a trait of character . . . for the purpose of proving action in conformity therewith on a particular occasion”); *id.* 404(b) (excluding “[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith”); *id.* 608-609 (restricting impeachment by proof of bad character, specific acts of misconduct, and prior conviction of crime). Damaška points out that such exclusion is almost unknown in Continental systems. See DAMAŠKA, *supra* note 1, at 16.

34. Damaška speaks of the “distinctive concern of Anglo-American evidence law” that “dirty linen from a person’s past could obscure whatever relevance propensity inferences might possess.” DAMAŠKA, *supra* note 1, at 17.

35. I have discussed this point at some length with reference to character impeachment. See Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian (!?) Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 645-54, 680-87 (1991).

36. Like Damaška, I am acting on the pleasantly naive assumption that there is such a thing as truth and that we know approximately what it means. For Damaška’s helpful comments in this regard, see DAMAŠKA, *supra* note 1, at 94-95.

extent, the substantive law. Thus, as I contend in Part II, exclusions of this type are related not to a desire to ensure factual accuracy, but to the common law system's orientation toward individual rights and its drive for uniformity.

4. *The "Best Evidence" Principle*

Another kind of rule that is apposite here, and to which Damaška adverts at other points but not in this context, is based on the "best evidence" principle. This principle provides that, even though introduction of an evidentiary item would be net beneficial to the truth-determining process, exclusion might yet be warranted on the ground that it will induce the proponent to introduce evidence that would be better for that process.³⁷ The principle provides some support for characteristics of the common law system such as the rule against hearsay, the preference for original documents, and the authentication requirement. Because the rationale of the principle is that exclusion will have a beneficial effect on party behavior, the force of the principle arises from party domination of the presentation of evidence.

5. *Summary*

In sum, therefore, the common law evidentiary system does have a strong prophylactic orientation, as Damaška argues. But I see the nature of that orientation somewhat differently. The common law system is aggressive in using exclusionary rules both for extrinsic and intrinsic purposes. The principal intrinsic purposes served by these rules are to save time and resources, to ensure that factfinders adhere to legal norms, and to induce proponents to produce better evidence. Damaška is correct in arguing that cognitive disabilities of factfinders are generally a weak basis for exclusion, but I believe he is mistaken in thinking that this is a principal basis for the common law's exclusionary rules—that the common law's emphasis on this factor has generative, rather than merely rhetorical, force. A significant consequence of this conclusion, as I emphasize in Part III, is that the role of the jury as factfinder provides a relatively small part of the justification for most common law evidentiary doctrines; many of those doctrines would have much the same force, however strong or weak that force may be, absent the jury.

B. *Structuring the Analysis of Evidence*

Damaška contends that, despite a general view to the contrary, an important aspect of the common law system is an aspiration to structure the

37. See *id.* at 85 n.22. Damaška properly cites Dale Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988), as an important exposition of this idea.

factfinder's analysis of evidence.³⁸ From my essentially noncomparative perspective, I do not recognize such a feature of our system. Damaška concedes that the opacity of the jury verdict—where juries are still the factfinders—is a powerful factor cutting against him.³⁹ So too, for that matter, is the wide deference paid to factual findings made by judges in bench trials.⁴⁰ Moreover, there is much more we could do to structure the jury's analysis of factual findings that we do not do. Jury instructions offer the best available means to impose such structure, but they are usually delivered orally rather than in writing—and often in a monotone, as if to signal the jury not to take them seriously. We treat the jury room as a black box, disallowing any impeachment of the jury's decision so long as its proceedings are not tainted by any improper extrinsic influence, even if jurors acknowledge that they flagrantly violated their instructions.⁴¹ The jury is usually asked to return an inarticulate general verdict, even though more specific findings could (at least in civil trials) be demanded.⁴² And courts reviewing a verdict generally strain to uphold it as long as they can imagine any plausible line of thought that might have led to it.⁴³ What, then, is the basis for Damaška's claim that the common law aspires to structure the factfinder's reasoning process?

1. *Corroboration Rules*

Damaška cites corroboration rules—rules providing that one witness's direct testimony to an event cannot alone prove the event—as an example of the common law system's aspiration to structure the factfinder's analysis. “[I]n the absence of the confirmation required by law,” Damaška writes, “triers of fact are not supposed to take a fact as proven no matter how persuaded they might be that it exists.”⁴⁴ But such rules—which are of rather small importance today⁴⁵—seem to be rules of admissibility or sufficiency rather

38. See DAMAŠKA, *supra* note 1, at 17-24.

39. See *id.* at 17.

40. See, e.g., FED. R. CIV. P. 52(a) and advisory committee's note to 1985 amendment (providing that in bench trials, “[f]indings of fact . . . shall not be set aside unless clearly erroneous”).

41. See FED. R. EVID. 606(b) and accompanying advisory committee's note (providing, subject to qualification, that “a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or to dissent from the verdict or indictment”). Indeed, the Supreme Court has declined to allow a verdict to be impeached even by evidence of extensive drug and alcohol use by jurors during the trial and deliberations. See *Tanner v. United States*, 483 U.S. 107 (1987).

42. See FED. R. CIV. P. 49(b).

43. See *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) (“Only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear.”).

44. DAMAŠKA, *supra* note 1, at 18.

45. Although Damaška does not cite any currently prevailing corroboration rules, there is a substantial number of such rules. For example, many American jurisdictions require some corroboration for criminal confessions, but this requirement appears to be rather easily satisfied. See 1 MCCORMICK ON EVIDENCE § 145, at 559-63 (John H. Strong et al. eds., 4th ed. 1992). Some jurisdictions require corroboration in actions alleging recovered memory of child sexual abuse, see Sheila Taub, *The Legal Treatment of Recovered Memories of Child Sexual Abuse*, 17 J. LEGAL MED. 183, 196, 199-201 (1996), but such actions, while

than regulations of the factfinding process. That is, these rules do not tell the factfinder how to go about determining whether a fact is true; instead, they determine whether a given item of evidence is admissible or whether the evidence as a whole is sufficient for the factfinder to determine that the proposition is true.⁴⁶

2. Presumptions

Similar observations can be made about presumptions, which Damaška mentions in passing.⁴⁷ A presumption is a rule providing, in effect: "Given predicate *X*, then presumed fact *Y* must be taken as true, unless there is sufficient evidence of not-*Y*."⁴⁸ Presumptions may appear at first to be intrusions into the middle of the factfinding process. I do not believe, however, that in fact they impose much structure on juries' analysis of evidence. Rather, their most significant aspect is their impact on whether a given issue needs to be decided by the jury at all.⁴⁹

extraordinarily troubling, are still relatively infrequent, *see id.* at 185-86. The Constitution requires two witnesses to the same overt act for proof of treason, *see* U.S. CONST. art. III, § 3, cl. 1, but treason prosecutions are very rare in the modern day. In addition, until recent times, many jurisdictions required corroboration for proof of rape. *See* Richard A. Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309, 311 n.8 (1973) (reviewing examples). Fortunately, that rule has been abrogated in most jurisdictions, *see* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 371 (6th ed. 1995) (noting that no American state now requires corroboration in forcible rape cases), although it lingered for far too long. The testimony of children and accomplices also required corroboration until relatively recently. *See* COLIN TAPPER, *CROSS AND TAPPER ON EVIDENCE* 233-34, 247 (8th ed. 1995). Of course, uncorroborated evidence may often fail to persuade a jury, and lack of corroboration may cause a prosecution not to be brought. *Cf.* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986) ("Corroboration requirements unique to rape may have been repealed, but they continue to be enforced as a matter of practice in many jurisdictions."). This, however, is not a matter of evidence law.

46. *See* FED. R. EVID. 801(d)(2) (providing that "[t]he contents of the [offered] statement . . . are not alone sufficient to establish" certain predicates for admissibility under the theory of vicarious admission); FED. R. EVID. 804(b)(3) (providing that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible [under the hearsay exception for statements against interest] unless corroborating circumstances clearly indicate the trustworthiness of the statement"); 1 MCCORMICK, *supra* note 45, at 562 ("Whether the requirement [of corroboration for confessions] is one of admissibility, sufficiency of the evidence, or both, it obviously is to be applied in at least the first instance by the trial judge.").

47. *See* DAMAŠKA, *supra* note 1, at 18-19.

48. *See* 2 MCCORMICK, *supra* note 45, § 342, at 450.

49. The initial burden of production may take the form of a presumption: "Absent sufficient evidence of *A*, not-*A* is presumed." (In this statement, the predicate *X* in the general form of a presumption stated in the text comprises all the information the jury is allowed to bring in from the outside world and nothing else, and it is left implicit.) That is, absent sufficient evidence of *A*, the court takes not-*A* as given, and the issue never reaches the jury.

Thereafter, a presumption might conditionally shift the burden of production, providing: "Given *B*, then *A* must be found unless there is sufficient evidence of not-*A*." In this form, however, the presumption is an instruction to the court, not to the jury. If the party opposing *A* presents sufficient evidence to put *A* in substantial doubt, then there is no need to give an instruction based on the presumption at all; the case should simply go to the jury with instructions to find *A* or not-*A* based on all the evidence, which includes the evidence of *B*. (This is not so with respect to an irrebuttable presumption, but such a presumption is really a disguised, and poorly articulated, rule of substantive law. *See id.* at 451.) If, on the other hand, the party opposing *A* has not presented sufficient countering evidence and the party favoring *A* presents

3. *Instructions To Disregard Evidence*

As a further example of the common law's aspiration to structure the factfinder's analysis, Damaška cites instructions to ignore evidence that has been heard notwithstanding its inadmissibility.⁵⁰ Such instructions, however, are merely attempts—perhaps hypocritical—to enforce exclusionary rules.⁵¹ If the evidence should not have been heard but was admitted, and the judge is determined not to grant a mistrial, then what should she do but ask the jury to disregard the evidence and hope for the best? Moreover, the Continental system has a counterpart to this practice: The courts, much like a common law judge sitting as factfinder, are restrained by fear of reversal from relying on unacceptable evidence in justifying their findings.⁵²

4. *Limited Admissibility*

As a final example of the manner in which the common law system allegedly structures the factfinder's decisions, Damaška mentions instructions of limited admissibility, which tell jurors that they may consider an item of evidence for one purpose but not for another.⁵³ These instructions do indeed intrude into the jury's analysis of evidence—if they are taken seriously. Nevertheless, I do not believe that they represent a strong aspiration to structure factfinding analysis. For one thing, the nature of these rules suggests

overwhelming proof of *B*, then the court should give a simple instruction to take *A* as given—or, if *A* is dispositive of the case, the court need not submit the case to the jury at all.

Only if there is sufficient, but not indisputable, proof of *B* and insubstantial evidence of not-*A* does the presumption yield an instruction to the jury, in the form "If you find *B*, you must find *A*," an instruction that might be thought to structure the jury's factfinding. Even in this context, however, the instruction is, in effect, more a statement of what the jury's task is than an attempt to structure how it achieves that task; it amounts to a statement that, rather than having to determine whether *A* is true, the jury should determine whether *A* or *B* is true. Moreover, presumptions most often are based on probability, i.e., on the perception that the presumed fact *A* most likely follows from the premise *B*. See *id.* at 454-55. Thus, an instruction to find *A* given *B* usually tells the jurors to do what they would have done anyway. In fact, it is likely that when courts instruct juries in the language of presumptions, they often mean (notwithstanding the mandatory language) not to *require* that the jurors find the presumed fact if they find the predicate fact, but only to remind them that they *may* infer the presumed fact if they are so persuaded. My speculation on this point is based largely on the fact that courts do not make stringent efforts to ensure that juries follow presumptions.

50. See DAMAŠKA, *supra* note 1, at 18.

51. Research yields mixed, often discouraging results on the effects of instructions to disregard. See Saul M. Kassir & Christina A. Studebaker, *Instructions To Disregard and the Jury: Curative and Paradoxical Effects*, in *INTENTIONAL FORGETTING: INTERDISCIPLINARY APPROACHES* 414, 422 (Jonathan M. Golding & Colin M. MacLeod eds., 1998); see also *infra* note 55 and accompanying text (discussing the well-known ineffectiveness of some limiting instructions).

52. See DAMAŠKA, *supra* note 1, at 17-18.

53. I have discussed the idea of limited admissibility at some length elsewhere. See Richard D. Friedman, *General Editor's Introduction* to DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE* at xxxv, xxxv-xlii (Richard D. Friedman ed., 1996). For a thorough exploration of limited admissibility, see LEONARD, *supra*, §§ 1.1 to 1.112.

that any such structuring is an effect rather than a motive: These are generally rules of limited *inadmissibility*, holding that the costs of admissibility outweigh the benefits with regard to certain propositions but recognizing that the evidence might be helpful to truth determination with regard to other propositions.⁵⁴ Limited admissibility instructions thus reflect an unwillingness to be confined to two unpalatable choices: unduly restricting the information available to the factfinder, on the one hand, or abandoning altogether the impulse behind the exclusionary rule, on the other.

Moreover, as with presumptions, the most substantial impact of rules of limited admissibility may not be on the jury at all. Indeed, jurors often fail to follow instructions limiting the use to which they may put evidence presented to them.⁵⁵ That does not mean that *rules*—as opposed to instructions—of limited admissibility are inconsequential, however. Precisely because juries will likely ignore an instruction to consider evidence with respect to one defendant but not with respect to another, such rules may be critical in determining whether a case involving multiple defendants must be tried by multiple juries rather than by a single one.⁵⁶ And, probably most significantly, such rules are sometimes important in determining whether a case goes to the jury at all: If Porter's prior statement identifying Green as his drug supplier is admitted to impeach Porter's denial from the witness stand that he remembers who his supplier was but not to prove that Green was the supplier,⁵⁷ there may be insufficient proof of Green's guilt for the case to reach the jury. In short, the concept of limited admissibility has a significant potential impact on the shape and result of litigation, but only a slight and uncertain one on how a jury deals with the evidence actually presented to it.

54. See, e.g., FED. R. EVID. 407 advisory committee's note ("Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct."); see also, e.g., FED. R. EVID. 408 advisory committee's note ("Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule.").

55. Note the well-known statement of Justice Jackson: "The naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citations omitted); see also, e.g., Sarah Tanford et al., *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 LAW & HUM. BEHAV. 319 (1985) (reporting, as the result of a mock juror study, the limited success of limiting instructions in reducing excess conviction rates attributable to joinder of similar charges); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence To Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985) (finding that mock jurors improperly used prior conviction evidence despite instructions).

56. See *Bruton v. United States*, 391 U.S. 123 (1968) (holding that a limiting instruction inadequately protected the defendant against prejudice created by the confession of the codefendant that was admissible only against the codefendant).

57. I have in mind the factual setting, but not the outcome, in *California v. Green*, 399 U.S. 149, 151-53, 170 (1970).

5. Conditional Relevance

At least one other type of rule, not mentioned by Damaška, can reflect an intervention in the factfinder's analytical process. This is the rule of conditional relevance. As classically conceived, the rule provides that if the relevance of evidence *A* depends on whether proposition *B* is true, *A* should be admitted only upon or subject to "the introduction of evidence sufficient to support a finding" of *B*.⁵⁸ In practice, however, the intrusion posed by the rule of conditional relevance is not substantial,⁵⁹ and in any event the intrusion could (and should) be minimized without fundamentally altering the common law system.⁶⁰

6. Summary

In sum, therefore, Damaška's claim that the common law evidence system

58. FED. R. EVID. 104(b). In some statements of the rule, the court must not only determine whether the jury *could* find the preliminary fact, but it must also ask the jury to determine the truth of that fact. *See, e.g.,* CAL. EVID. CODE § 403 assembly committee's note (West 1995) ("[T]he jury must finally decide whether the preliminary fact exists."); EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 43 (1954) (stating, in reference to the situation in which two propositions are mutually dependent on each other for relevance, that "the jury should determine the dispute as to each under proper instructions from the judge"); *cf. Huddleston v. United States*, 485 U.S. 681, 690 (1988) (speaking of "the requisite finding" of the preliminary fact). The Advisory Committee for the Federal Rules of Evidence cited both the California statute and Morgan's book in explaining Rule 104(b). *See* FED. R. EVID. § 104(b) advisory committee's note.

59. The rule is not usually applied in the strong version, discussed *supra* note 49. More often, it seems, courts purport merely to determine whether the jury could find the predicate fact *B* to be true; if it could, the courts admit evidence *A* along with the evidence bearing on *B* without imposing a restrictive instruction. *See Huddleston v. United States*, 485 U.S. 681, 690 (1988) ("The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.").

60. This is the principal point of one of my previous articles. *See* Richard D. Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 MICH. L. REV. 439 (1994) [hereinafter Friedman, *Conditional Probative Value*]. For subsequent discussion, see Peter Tillers, *Exaggerated and Misleading Reports of the Death of Conditional Relevance*, 93 MICH. L. REV. 478 (1994); Dale A. Nance, *Conditional Probative Value and the Reconstruction of the Federal Rules of Evidence*, 94 MICH. L. REV. 419 (1995); and Richard D. Friedman, *Refining Conditional Probative Value*, 94 MICH. L. REV. 457 (1995) [hereinafter Friedman, *Refining Conditional Probative Value*].

There is one way in which the classical conception does restrict the factfinding process artificially. Sometimes, it excludes evidence *A* absent sufficient proof to support a finding of *B* although *A* has considerable probative value (so long as *B* is a plausible possibility) even absent such proof. *See* Friedman, *Conditional Probative Value*, *supra*, at 445-53. (In this earlier article, I described the restriction as an "intrusion," *id.* at 445; if, however, the conditional relevance rule is applied in the more moderate form described above, it does not intrude in the sense I am using that term here. That is, the rule may cause the exclusion of evidence and so restrict the jury's factfinding, but it does not structure the jury's analysis of the evidence presented to it.) The problem might be more one of theoretical neatness than of practical consequence. The right result is to admit evidence *A*—whether or not the jury could find *B* more likely true than not—if, given all the circumstances, *A* has sufficient probative value to warrant admission. I believe courts generally reach this result without regard to the prevailing theory. *See id.* at 448-51. An exception might be in the area of authentication, where it seems that courts have sometimes been too demanding in requiring affirmative evidence. *See, e.g.,* 2 MCCORMICK, *supra* note 45, § 218, at 37 ("[T]he purported signature or recital of authorship on the face of a writing will *not* be accepted as sufficient preliminary proof of authenticity . . ."). Even in this context, however, courts have usually applied the more moderate form of the conditional relevance principle; that is, they have not demanded a separate finding by the jury regarding authenticity.

is marked by a "pronounced aspiration . . . to structure the factfinders' analysis of evidence"⁶¹ is unpersuasive. Instead, the system pays great attention to the question of whether the evidence is sufficient for the factfinder to make a particular type of decision; if it is, the factfinder is left remarkably free. Damaška, in my view, pays too little attention to this matter of sufficiency.⁶² The need to determine sufficiency is related to the common law's separation of judge and jury, but I think it is related also to the common law style of attempting to determine many issues as a matter of law so as to be generalizable to many cases.

II. THE SYSTEM AS SEEN FROM WITHIN

Damaška's description of the Anglo-American evidentiary system leaves out, or at least underemphasizes, three significant features. This part will describe those features and begin to discuss how they explain a great deal about the system. Most important among these features is an emphasis on individual rights. Second is a tendency to treat evidentiary matters in a legalistic way, with an aspiration toward uniformity. Third is a rationalist intellectual framework centering on a frank recognition of uncertainty in factfinding and oriented toward structures that are analytically sound even though theoretically and practically very complex. These three features are interrelated. The rights orientation tends to frame evidentiary issues as matters that should be resolved by law in as uniform a way as possible; conversely, legalistic treatment can lead a party to claim a right to a given evidentiary result. An emphasis on legalistic treatment also leads to the probing style that is characteristic of the rationalist approach.

In this part, I make some comparisons between Anglo-American and Continental evidentiary law, but my claim is not principally comparative. Instead, I attempt to describe significant features of the common law system. I suspect these features are not as strong in the Continental system, but I do not try seriously to prove the point. If I am wrong about that, so be it. I do not believe my essential points will be undercut.

A. *Free People of Heart and with Tongue: Individual Rights and the Common Law Evidentiary System*

From my perspective, the dominant feature of the common law evidentiary system is its grounding in rights of the individual, especially the parties to the litigation. Some rights of parties and nonparties in the Continental system, one

61. DAMAŠKA, *supra* note 1, at 24.

62. See *infra* Section II.C; *infra* Subsection III.A.4.

learns from Damaška, are absent from or weaker in the common law system.⁶³ On the whole, however, I believe that a conception of individual rights—albeit rights that are often ill-defined and often in tension with one another—is far stronger and more pervasive in the common law than in the Continental system. Indeed, the institutional pillars that Damaška analyzes—the divided trial court, compressed trials, and above all the adversary system—emerged largely from this conception. Thus, Damaška may put matters backwards when he states that “several aspects of the adversary factfinding style have been shored up by elevation to the status of a constitutional mandate.”⁶⁴ The constitutional mandates—already quite old in the United States—exist because they reflect significant rights that should be diminished only with great caution.

Before discussing how the common law’s individual rights orientation affects the system’s evidentiary law, I sketch some historical background to that orientation.

1. *Historical Background*

For centuries, observers in both England and Continental Europe have noted that the English were a freer and more individualistic people than the Europeans.⁶⁵ There is enormous historical debate over whether this disparity was real or merely perceived, when it developed, and what the causes were.⁶⁶

63. Damaška mentions testimonial privileges of witnesses, which are sometimes broader in the Continental system than in common law countries. See DAMAŠKA, *supra* note 1, at 12-13. Privileges are, in a sense, the shadow of other rights, in that they limit the right of litigants (often the adversary of the privilege holder) to gather and present evidence. Damaška also suggests that Continental courts are more likely than their Anglo-American counterparts to accord litigants a right to present evidence notwithstanding the tardiness of the offer. See *id.* at 67 & n.16.

64. *Id.* at 134-35. Damaška cites dicta in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), and *Maryland v. Craig*, 497 U.S. 836 (1990), to make this point. See DAMAŠKA, *supra* note 1, at 135 n.17. But neither *Strickland* nor *Craig*, which dealt respectively with the right to counsel and the right of confrontation, expanded defendants’ rights. Indeed, in both cases, the Court held against the defendant.

65. This paragraph and some of the succeeding discussion are drawn largely from ALAN MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM: THE FAMILY, PROPERTY, AND SOCIAL TRANSITION* (1978) [hereinafter MACFARLANE, *ORIGINS OF ENGLISH INDIVIDUALISM*], especially the Introduction and Chapter 7, “England in Perspective.” Although Macfarlane’s book is controversial, it has “become a classic.” Paul Helas, *Introduction to ALAN MACFARLANE, ON INDIVIDUALISM* at i, i (1994). I am persuaded by Macfarlane’s main argument, which supports the view that the English are (and have been) more individualistic, but in any event my own argument does not depend on the full reach of his; for my purpose, the perception of English individualism is more important than the reality. For another treatment of the phenomenon of English individualism, see, for example, C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* at vii, 3 (1962), which develops a theory that “English political thought from the seventeenth to the nineteenth centuries had an underlying unity,” based on a “conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them.”

66. England’s different landholding system, which made private rights fuller and transferability easier; its greater diffusion, geographically and demographically, of wealth and education, and its absence of a caste system; its lack of an absolute monarchy, a strong bureaucracy, high taxes, or marauding armies; its longstanding prosperity; its style of family upbringing and its apprenticeship system, which tended to deemphasize the family as a governing unit; the general “omeriness” of the English; and, beginning with

But in any event, there is little doubt that such disparities were commonly perceived as early as the thirteenth century, that they were unquestionable by the sixteenth century, and that the legal system was at their heart. In the middle of the thirteenth century, for example, the celebrated encyclopedist Bartholomaeus Anglicus described his fellow Englishmen as "free men of herte and with tongue."⁶⁷ By that time, the English legal system had "evolved into one of individual rights and ownership."⁶⁸ The English repeatedly praised their legal system in comparison to the Roman-canonic system that prevailed on the Continent. Particularly celebrated examples of such praise are John Fortescue's paean, *De Laudibus Legum Anglie* (*In Praise of the Laws of England*),⁶⁹ written around 1470 in the form of a dialogue with a fictitious prince explaining the superiority of the English legal system, and its successor essay, *The Governance of England*.⁷⁰ Fortescue wrote unfavorably about the French system, where all law emanated from an absolute monarch and the people were mere subjects; by contrast, he saw England as a limited monarchy based on the voluntary acquiescence of the people, an association of free men held together by mutual contracts for self-protection.⁷¹ The less hierarchical English social structure made possible a system of adjudication that depended on juries,⁷² a system that Fortescue praised for its openness and confrontational nature.⁷³ This emphasis was echoed through the centuries by numerous English commentators.⁷⁴ By the seventeenth century, when phrases

the Reformation, religion—all these, along with the legal system, were part of a web of cause and effect that formed a distinctive picture of English individualism. See MACFARLANE, ORIGINS OF ENGLISH INDIVIDUALISM, *supra* note 65, at 2-5, 175-88.

67. 2 BARTHOLOMAEUS ANGLICUS, ON THE PROPERTIES OF THINGS: JOHN TREVISA'S TRANSLATION OF BARTHOLOMAEUS ANGLICUS DE PROPRIETATIBUS RERUM 734 (John Trevisa trans., Oxford Univ. Press 1975).

68. MACFARLANE, ORIGINS OF ENGLISH INDIVIDUALISM, *supra* note 65, at 188. This is Macfarlane's characterization, drawn in part from the work of Henry Maine. See HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 323 (London, John Murray 1891) ("[F]rom very early times landed property changed hands by purchase and sale more frequently in England than elsewhere."); *id.* at 341-47 (detailing the development of the conception of individually held land); *id.* at 355 (discussing "liberty of transfer and devise").

69. SIR JOHN FORTESCUE, *In Praise of the Laws of England*, in ON THE LAWS AND GOVERNANCE OF ENGLAND 40 (Shelley Lockwood ed., Cambridge Univ. Press 1997) (c. 1470).

70. SIR JOHN FORTESCUE, *The Governance of England*, in ON THE LAWS AND GOVERNANCE OF ENGLAND, *supra* note 69, at 83.

71. See *id.* at 83-90. Macfarlane points out the similarity between Fortescue's view and that expressed two hundred years later by Thomas Hobbes. See MACFARLANE, ORIGINS OF ENGLISH INDIVIDUALISM, *supra* note 65, at 180 n.68.

72. See FORTESCUE, *supra* note 69, at 43; see also MACFARLANE, ORIGINS OF ENGLISH INDIVIDUALISM, *supra* note 65, at 181 (summarizing Fortescue's argument on the relationship between English social structure and the use of juries). Fortescue's observations on social structure were consistent with those made centuries later by Alexis de Tocqueville. See MACFARLANE, ORIGINS OF ENGLISH INDIVIDUALISM, *supra* note 65, at 181-82 (comparing Fortescue's observations with Tocqueville's).

73. See FORTESCUE, *supra* note 69, at 38-41.

74. See, e.g., La Case del Union d'Escose ove Angleterre, 72 Eng. Rep. 908, 913 (K.B. 1606); MATTHEW HALE, HISTORY OF THE COMMON LAW 163-64 (Charles M. Gray ed., University of Chicago Press 1971) (c. 1670); THOMAS SMITH, DE REPUBLICA ANGLORUM 114-15 (Mary Dewar ed., Cambridge Univ. Press 1982) (c. 1565); S. Emlyn, Preface to STATE TRIALS at xxii (Sollyn Emlyn ed., 2d ed. 1730).

like “an Englishman’s birthright” had become commonplace,⁷⁵ the English tended to regard the common law as being as old as their history, as natural as the air.⁷⁶ Visitors from the Continent had a similar view. After a visit in 1729, Montesquieu emphasized his perception that the English were a “free people” in a nation “passionately fond of liberty,” the “[o]ne nation . . . in the world that has for the direct end of its constitution political liberty.”⁷⁷ The perception persisted even after the French Revolution; Alexis de Tocqueville emphasized the castelessness of English society—a characteristic that, he noted, had passed to America—and he believed that the spirit animating English law, protection of individual rights and liberties, was responsible in significant part for the prosperity and stability of English life.⁷⁸

This strong and enduring sense of individualism, of personal right, and of the role of the legal system as its protector, has had a profound impact on the common law’s procedural and evidentiary system. I turn now to a discussion of that impact.

2. *Individual Rights Orientation in the Common Law Evidentiary System*

In 1992, Damaška and I were both members of a delegation of Western legal scholars that visited Latvia to advise elements of the Latvian government and legal establishment on what kind of legal system they might create for their newly emerged state. It turned out that very little of the Anglo-American system held much interest for them; they regarded it as rather bizarre. But they were interested in the possibility of jury trials, at least for serious crimes. Significantly, their interest was based not on the merits of collective decisionmaking, but on a consideration that, at least in earlier times, made the common law jury a passionately defended institution: the perception that the jury stands as a bulwark against oppression by the state operating through judges who are its agents.⁷⁹ That consideration may appear less pressing in

75. See, e.g., JOHN LILBURNE & RICHARD OVERTON, ENGLANDS BIRTH RIGHT JUSTIFIED AGAINST ALL ARBITRARY USURPATION (n.p. 1645).

76. See MACFARLANE, ORIGINS OF ENGLISH INDIVIDUALISM, *supra* note 65, at 184.

77. 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 181, 365, 368 (Thomas Nugent trans., D. Appleton & Co. 1900) (1748).

78. See ALEXIS DE TOCQUEVILLE, L’ANCIEN REGIME 88-90, 104-05, 184-85 (M.W. Patterson trans., Oxford Univ. Press 1933) (1856); see also SEYMOUR DRESCHER, TOCQUEVILLE AND ENGLAND 198-200 (1964) (describing Tocqueville’s view of England’s liberty as an essential ideological weapon against the French Revolution, and noting that England, “as the harbinger of the modern age . . . stood as an example to France of the proper limits of the revolutionary impulse, an impulse which stopped short of dictatorship, antireligious sentiments, and attacks on individual rights, especially property rights”). Drescher provides a detailed account of the role of England in Tocqueville’s thought, a place that Tocqueville said had become “intellectually [his] second country.” DRESCHER, *supra*, at vii.

79. Cf. DAMAŠKA, *supra* note 1, at 28 n.5 (“Only in a few countries struggling to establish a post-totalitarian administration of justice does the criminal jury still hold an allure.”); *id.* at 120 (contrasting “civil-service judges” and “ordinary citizens enlisted in jury service”); H.H. Jescheck, *Germany*, in THE ACCUSED: A COMPARATIVE STUDY 246, 251-52 (J.A. Coutts ed., 1966) (noting that in England the jury is looked upon as a bulwark safeguarding the freedom of the defendant, while Germans tend to believe that

modern common law countries, where we are less likely than we once were to regard judges as imposed from above, but it should not be forgotten in evaluating the merits of the jury.

Other procedural aspects of the common law system have a strong foundation in notions of individual rights. The right to counsel, of course, is one (although it did not become well-founded in most criminal cases until the eighteenth century,⁸⁰ which is later than one might think). So too are the presumption of innocence, together with the high standard of persuasion necessary for conviction of a crime,⁸¹ and the privilege against self-incrimination.⁸²

Even more fundamental to the common law system, especially in criminal trials, is the right to confront adverse witnesses, with their testimony taken subject to punishment for false statement. This right has roots of very long standing within the common law system and has had a critical impact on the modern law of hearsay.⁸³ By the middle of the sixteenth century—long before the advent of the criminal defense lawyer—a confrontational view of the trial as an “altercation” had developed.⁸⁴ Treason defendants’ persistent demands that they be brought “face to face” with their accusers⁸⁵ found recurrent

a mixed tribunal protects individuals equally well).

80. See John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1197 (1996).

81. For helpful discussions of the 17th-century intellectual climate in which the reasonable doubt standard developed, see HENRY G. VAN LEEUWEN, *THE PROBLEM OF CERTAINTY IN ENGLISH THOUGHT, 1630-1690*, at xiii (1963); and BARBARA J. SHAPIRO, *BEYOND REASONABLE DOUBT AND PROBABLE CAUSE* 7 (1991).

82. The history of this privilege is a matter of considerable controversy. See generally R.H. HELMHOLZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* (1997). Although there was such a privilege on the Continent, it seems to have been relatively weak. See R.H. Helmholz, *The Privilege and the Ius Commune: The Middle Ages to the Seventeenth Century*, in HELMHOLZ ET AL., *supra*, at 17, 46. Professor Langbein has argued powerfully that there could be no effective privilege against self-incrimination at trial so long as the “accused speaks” model of trial, in which criminal defense lawyers were absent, prevailed. See John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, in HELMHOLZ ET AL., *supra*, at 82, 108. But the privilege, as understood at the time it was incorporated into the Fifth Amendment to the Constitution, “was not intended to afford criminal defendants a right to refuse to respond to incriminating questions . . . [but] simply to prohibit improper methods of interrogation.” Albert N. Alschuler, *A Peculiar Privilege in Historical Perspective*, in HELMHOLZ ET AL., *supra*, at 181, 184-85; see also M.R.T. Macnair, *The Early Development of the Privilege Against Self-Incrimination*, 10 OXFORD J. LEGAL STUD. 66 (1990) (arguing that before approximately 1688, the privilege was applied to witnesses and to allegations of crime made in civil proceedings, but did not give a criminal defendant the right to remain silent at trial, and that this earlier conception was attributable largely to Continental and canon law). Langbein has shown that torture did occur in England prior to 1640, see JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME* 81-128, 135-36 (1977), but its use there was less frequent, more contentious, and of a shorter duration than on the Continent, see *id.* at 9, 77-78, 129-39.

83. I am currently engaged with the English legal historian Michael Macnair in a historical project in which, among other things, we attempt to prove this claim.

84. See SMITH, *supra* note 74, at 114.

85. E.g., Duke of Somerset’s Trial, 1 Howell’s State Trials 515, 520 (1551); Seymour’s Case, 1 Howell’s State Trials 483, 492 (1549); R. v. Rice ap Griffith (1531), in *THE REPORTS OF SIR JOHN SPELMAN*, reprinted in 93 SELDON SOCIETY 47, 48 (J.H. Baker ed., 1977) (stating that the witness James ap Powel (an accomplice) “avowa toutz lour actz facie ad faciem” (avowed all their acts face to face)).

support in acts of Parliament.⁸⁶ English legal commentators consistently compared favorably this open method of taking testimony with the Continental style of taking "written depositions in a corner," out of the presence of the parties.⁸⁷ Though the confrontation right has roots long antedating the common law system,⁸⁸ it is perhaps the right most characteristic of that system, preserving the individual party's ability to examine adverse witnesses face to face rather than relying on the efforts of a supposedly neutral judiciary.

I do not mean, of course, to suggest that the rule against hearsay as we know it should be preserved; on the contrary, I believe it is in need of a major revamping and unnecessarily excludes much useful evidence.⁸⁹ I do mean to suggest that, at the core of the hearsay rule, and underlying the Confrontation Clause of the Sixth Amendment,⁹⁰ is a right that is very much worth preserving: the right of a criminal defendant to confront and cross-examine the maker of a testimonial statement, whether or not that statement was made at trial.⁹¹ That right is an anchor of our system, not a bit of flotsam released by one of its decaying institutions.

Other significant exclusionary rules also find a substantial part of their support in the individual rights orientation of the common law. One is the set of privileges against intrusion into intimate relationships.⁹² Another is the set

86. See, e.g., An Acte whereby certayne Offences bee made Treason, 13 Eliz., ch. 1, § 9 (1571); An Acte whereby certayne Offences bee made Treason, 1 Eliz., ch. 5, § 10 (1558-1559); An Acte restoring to the Crowne thauyent Jurisdiction over the State Ecclesiasticall and Spuall, and abolyshing all Forreine Power repugnaunt to the same, 1 Eliz., ch. 1, § 21 (1558-1559); An Acte whereby certayne Offences bee made Treasons; and aslo for the Governement of the Kinges and Quenes Majesties Issue, 1 & 2 Phil. & M., ch. 10, § 11 (1554-1555); An Acte for the punyshment of div'se Treasons, 5 & 6 Edw. 6, ch. 11, § 9 (1552). With respect to requiring an oath from an adverse witness, note WILLIAM LAMBARDE, EIRENARCHA OR THE OFFICE OF JUSTICES OF PEACE 210 (P.R. Glazenbrook ed., Professional Books Ltd. 1972) (1581-1582), a manual for justices of the peace, which recommends that statutorily required examinations of accusing witnesses be taken under oath so that they could be used as testimony if the witness died before trial. See JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 27 (1974).

87. See, e.g., Le Case del Union d'Escose ove Angleterre, 72 Eng. Rep. 908, 913 (K.B. 1606); see also Emlyn, *supra* note 74, at iii-iv. Emlyn states:

The Excellency . . . of our Laws . . . I take to consist chiefly in that part of them, which regards CRIMINAL PROSECUTIONS . . . In other Countries . . . the Witnesses are examin'd in private, and in the Prisoner's Absence; with us they are produced face to face, and deliver their Evidence in open Court, the Prisoner himself being *present*, and at liberty to cross-examine them . . .

Id.

88. See, e.g., Acts 25:16 ("It is not the manner of the Romans to deliver any man to die, before he who is accused have the accusers face to face, and have opportunity to answer for himself concerning the accusation laid against him.").

89. See Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723, 753-63 (1992).

90. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

91. I am making a further effort to explore the nature of that right in two forthcoming articles. See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. (forthcoming Feb. 1998); Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS L.J. (forthcoming Mar. 1998).

92. I include in this category the right of one spouse not to testify against the other, and the privileges concerning confidential communications between a person and his or her spouse, physician, or psychotherapist. A related category may be the rape shield rules, see, e.g., FED. R. EVID. 412, which are based at least in significant part on a privacy right of the rape complainant. I do not include the attorney-

of rules restricting evidence of prior misconduct and character of a person.⁹³ As I argue later,⁹⁴ in part on grounds similar to those offered by Damaška, these rules are not founded on the supposed cognitive inabilities of the factfinder. But they do have a firm basis in protecting the criminal defendant, the usual target of this type of evidence: Exclusionary rules of these kinds offer some assurance that the defendant will be tried for what he is accused of doing in the case at bar, not for being a bad person or for having acted badly in the past.⁹⁵ Finally, the common law system protects the parties' affirmative right to present their case.⁹⁶ The Compulsory Process Clause of the Sixth Amendment and the notion that a party is entitled to "every person's evidence"⁹⁷ are manifestations of this right. So, too, is the ability of the party's legal representative to meet with those witnesses who are willing to talk with her.⁹⁸

Neither the sources nor the boundaries of these rights are clear, and in some cases their very validity may be doubtful. Often, too, they are in tension

client privilege here because I believe it is justified, not on intimacy grounds, but on a desire not to impede communication between the attorney and the client. The area of intimacy-based privileges may, as Damaška suggests, be one in which individuals' rights under some Continental systems exceed those under common law. See DAMAŠKA, *supra* note 1, at 12-13; see also *supra* note 63.

93. See FED. R. EVID. 404, 405, 608, 609.

94. See *infra* Subsection III.A.1.

95. I have argued elsewhere that the restriction on character impeachment of a criminal defendant ought to be made far more substantial. See Friedman, *supra* note 35.

96. See, e.g., *Washington v. Texas*, 388 U.S. 14 (1967) (holding that a statute prohibiting persons charged or convicted as participants in the same crime from testifying for each other violates the Sixth Amendment compulsory process right); see also *infra* note 215 and accompanying text.

As Damaška points out, it was not until relatively late that parties in common law proceedings were allowed to testify under oath. See DAMAŠKA, *supra* note 1, at 117 n.82. I am not quite sure why this strange situation was allowed to persist for so long. The presumption of innocence in criminal trials may have had a role, as may have the prevalence, at least before the advent of defense lawyers, of the "accused speaks" mode of trial. Perhaps most important was a style that treated defective information from various sources—such as the testimony of those unwilling to take an oath—as "not evidence." For a helpful account of the demise of this disqualification, see C.J.W. ALLEN, *THE LAW OF EVIDENCE IN VICTORIAN ENGLAND* 96-180 (1997).

97. The most commonly quoted expression of this maxim is probably Wigmore's assertion, closely paraphrasing statements made in a 1742 debate in the House of Lords, that "the public . . . has a right to every man's evidence." 8 J. WIGMORE, *EVIDENCE* § 2192, at 70 (McNaughton rev. 1961). The principle clearly applies to, and the maxim is quoted in favor of, individual litigants as well as prosecutors and grand juries. See, e.g., *Jaffee v. Redmond*, 116 S. Ct. 1923, 1928 & n.8 (1996) (invoking and reciting the history of "the familiar expression 'every man's evidence'"); *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citing this "fundamental principle" in limiting the privilege against adverse spousal testimony); *United States v. Nixon*, 418 U.S. 683, 709-11 (1974) (citing this "ancient proposition of law" in rejecting a claim of executive privilege); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (holding that this "longstanding principle . . . is particularly applicable to grand jury proceedings"); *Shannon v. Hansen*, 469 N.W.2d 412, 415 (Iowa 1991) (noting "the fundamental principle that ordinarily a private litigant is entitled to discover and use every person's evidence"); LEONARD MACNALLY, *THE RULES OF EVIDENCE ON PLEAS OF THE CROWN* 255 (London, J. Butterworth 1802) ("It [is] the undoubted legal constitutional right of every subject of the realm, who has a cause depending, to call upon a fellow subject to testify what he may know of the matters in issue; and every man is bound to make the discovery, unless specially exempted and protected by law." (reporting a decision of the Irish Court of Chancery, per the Master of the Rolls, in an 1802 case called *Butler v. Moore*)).

98. See, e.g., FREDERIC T. HORNE, *CORDERY'S LAW RELATING TO SOLICITORS* 273 (8th ed. 1988) ("A solicitor may interview and take proofs from any prospective witness at any time during the proceedings.").

with each other: The right of a party to present a relatively uncluttered case may conflict with her adversary's right to timely and extensive cross-examination;⁹⁹ the right of a rape defendant to confront the accusing witness collides with the victim's right to withhold on privacy grounds possibly probative information about her past. But this simply reinforces my essential point. Concepts of individual rights, as well as claims and discourse about them, permeate the common law evidentiary system, especially in criminal cases. And such claims are particularly strong in the United States—a nation that at its founding declared the importance of inherent and inalienable rights¹⁰⁰ and that very early enshrined an extensive set of litigation rights in its Constitution.

B. *The Rule of Law and the Search for Uniformity*

It is impossible to codify the law of evidence fully. In part, this is because, as Damaška puts it with characteristic verve, “the probative weight of evidence is a matter too unruly to obey the lawgiver’s rein, too contextual to be captured in a web of categorical legal norms.”¹⁰¹ Thus, vast realms of evidentiary decisionmaking must be left to the event, to be decided without much constraint by previously articulated rules.¹⁰² Not all aspects of evidence must inevitably be treated in this manner, however. Indeed, a salient aspect of the Anglo-American evidentiary system is its (often vain) aspiration to legalize evidentiary decisionmaking, to make of it a body of rules capable of reasonably uniform application. Although I hesitate to make comparative statements, it appears that this aspiration is far less pronounced in Continental systems.¹⁰³

An important source of the Anglo-American aspiration to uniformity is the rights orientation that I discussed in the previous section. If the admission of

99. See FED. R. EVID. 611(b) advisory committee’s note (recognizing the merit of the proposition that a “practice of limited cross-examination promotes orderly presentation of the case,” but concluding that the matter cannot be well resolved by a general rule).

100. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (declaring that “all men . . . are endowed by their Creator with certain inalienable rights”).

101. DAMAŠKA, *supra* note 1, at 20.

102. As Damaška writes, “Case law on matters of evidence is almost always fact-bound and often in the form of soft-edged rules or balancing tests that can be approximated with little exaggeration to guidelines, or rules of thumb.” *Id.* at 9. The most important example is the constellation of principles expressed in the rule governing the exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. See FED. R. EVID. 403.

103. Damaška contends that, although decisions of higher courts in the Continental system are not formally binding, they do effectively constrain lower court judges. See DAMAŠKA, *supra* note 1, at 8-9. He also argues that Continental higher courts tend to speak in “rule-like pronouncements” that cannot easily be evaded by fine factual distinctions. *Id.* at 10. He also states, however, that “rule-like pronouncements on some aspects of evidence seldom crystallize.” *Id.* at 10 n.7. Furthermore, Continental systems do not maintain the apparatuses that one would expect of a system in which uniformity was a priority. See *id.* at 8 n.2 (referring to “the highly selective reporting of judicial decisions in Continental countries generally”); *id.* at 9 (describing “the meager harvest of the search” for Continental legislation on evidentiary issues).

hearsay or of prior misconduct is thought to violate the rights of a party in some situations, then it becomes important to try to articulate just what those situations are. The case is similar with the standard of persuasion: The standard reflects the social utilities attached to the various possible outcomes, accurate and inaccurate, with the very high standard of persuasion required in a criminal prosecution premised principally on the perception that an inaccurate outcome favoring the prosecution is a dreadful result.¹⁰⁴ To a student of the common law, it would be a strange result to allow the standard to waffle from one case to another, depending on the decisionmakers in the particular cases.¹⁰⁵

Another source of the aspiration toward uniformity may be the desire to implement broad policy considerations through evidentiary rulings. I will consider two types of rules that reflect this idea in that they sacrifice some probability of accuracy in the case at hand in order to protect some other goal over the long term. First, an evidentiary rule may attempt to give future parties security so that they can act in a way the law deems desirable without creating adverse evidence. Uniformity of exclusion is important if the rule's policy goals are to be accomplished, for otherwise the rule will not give future parties the necessary security. For better or worse, this appears to be the principal basis for the rules excluding evidence, even if it is probative, of subsequent remedial measures,¹⁰⁶ settlement offers,¹⁰⁷ and the like (none of which, so far as I am aware, is present in the Continental system),¹⁰⁸ as well as for the attorney-client privilege.

Additionally, uniformity of exclusion may be justified in some cases because, without it, the factfinder is likely to use the evidence in ways that tend toward accurate results in the case at hand but that disregard longer-term goals of the legal system. I have in mind again evidence of prior misconduct. As I indicated above,¹⁰⁹ a factfinder who gives weight to evidence of prior misconduct in assessing the accused's conduct on the occasion in question may well be acting perfectly rationally. But it requires no assumption of cognitive or emotional frailty to suppose that receipt of this type of evidence will make the factfinder more eager to punish the accused than the law deems appropriate, effectively applying a lower standard of persuasion and perhaps

104. See Richard D. Friedman, *Answering the Bayesioskeptical Challenge*, 1 INT'L J. EVID. & PROOF 276, 276-78 (1997) (presenting a model of this view). For an earlier, somewhat simpler model, see Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1032-41 (1977).

105. The common law system may, however, take the point too far, applying a "one-size-fits-all" standard of persuasion to most issues within a case. I have suggested that a different, more stringent standard than the usual civil "more likely than not" may be appropriate when the issue is whether the defendant was the liable party or, alternatively, not involved at all. See Friedman, *supra* note 104, at 279.

106. See FED. R. EVID. 407.

107. See FED. R. EVID. 408.

108. I have offered some contemplations on the merits of these rules in Friedman, *supra* note 53, at xlii-liv. See also LEONARD, *supra* note 53, §§ 2.1 to 2.9, 3.1 to 3.9 (providing a comprehensive discussion of rules on subsequent remedial measures and settlement negotiations).

109. See *supra* text accompanying note 35.

broader substantive standards of criminality than it should. The problem is particularly acute when the factfinder is a jury. Jurors typically have a one-shot involvement with the legal system. They are less likely than legally trained judges to be comfortable with a style of decisionmaking that trades off good results in the case at hand (such as locking up bad people) for long-term principle (such as imposing punishment only for conduct properly adjudicated).

On somewhat different grounds, I believe the aspiration to uniformity also underlies much of the common law system's tendency to screen scientific evidence rather aggressively.¹¹⁰ Scientific evidence often concerns general propositions that recur from case to case; indeed, scientific experts often have nothing to offer about the facts of a particular case. In such situations (for example, in the Bendectin litigation that gave rise to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹¹¹), it may make little sense for factfinders in separate but materially identical cases to determine the scientific facts differently.¹¹²

110. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), the Court held that, under the Federal Rules of Evidence, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." This "gatekeeping" function, *id.* at 597, "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue," *id.* at 592-93. The Court went on to lay out four considerations that could enter into the decision. *See id.* at 593-94. *Daubert* thus rejected a standard that, at least on its face, is even less hospitable to scientific evidence, the "general acceptance" test articulated in *Frye v. United States*, 293 F. 1013, 1014 (1923). Before *Daubert*, the "general acceptance" test was "the dominant standard for determining the admissibility of novel scientific evidence at trial," *Daubert*, 509 U.S. at 585, and some states continue to adhere to it, *see, e.g.*, *People v. Leahy*, 882 P.2d 321 (Cal. 1994).

111. 509 U.S. 579 (1993).

112. Professors Laurens Walker and John Monahan have suggested that in some circumstances recurrent facts of this sort should be determined in the same manner as propositions of law—ultimately, by the court of last resort. *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987). Although there is considerable merit to their idea, the courts have not yet for the most part adopted it. A rather clumsy way of achieving much of the same objective may be to exclude scientific evidence if the court finds it clearly unpersuasive. A better alternative is for courts to treat the evidence as admissible but to consider granting summary judgment to the other side. In any case, however, the lack of case-specificity makes feasible a uniform rule on admissibility of scientific evidence.

The Supreme Court's recent decision in *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997), might seem to cut against my assertion that an aspiration to uniformity helps account for the fairly aggressive screening of scientific evidence in the common law system. In *Joiner*, the Court held that appellate review of decisions on the admissibility of scientific evidence should be under an "abuse of discretion" standard—which was not contested—and that the application of this standard is no different when exclusion of the evidence in question leads to judgment as a matter of law. This deferential stance suggests tolerance for a diversity of results. But this aspect of *Joiner* merely adhered to prior doctrine. It will be interesting to see whether, in the context of mass or recurrent torts, the appellate courts really do tolerate different results in different cases on the same evidentiary question. My speculation—fortified by the fact that *Joiner* itself searchingly reviewed the facts and restored a district court decision excluding evidence crucial to the plaintiff's case—is that they will not. In any event, the very fact that *Joiner* posed a problem for the Supreme Court, resulting in a reversal of the court of appeals, reflects a tension between the aspiration for uniformity and the practical need to have most evidentiary decisions made at the trial level.

C. *The Intellectual Framework*

In the late seventeenth and early eighteenth centuries, common law rules of evidence began to crystallize.¹¹³ This phenomenon reflected the broad intellectual context of the time, in which the modern conception of probability suddenly blossomed.¹¹⁴ Of great importance was the empiricist intellectual movement of the era, in which theologians, natural scientists, and historians focused on the quality of evidence in seeking to derive truths that could not be logically proved but could not reasonably be doubted. At least in part for religious reasons, the movement was stronger in England than in Catholic Europe.¹¹⁵ A preference for firsthand observation was a key feature of the

113. Following Langbein, Damaška states that "Anglo-American evidence law . . . was largely nonexistent in its present form as late as the middle decades of the eighteenth century." DAMAŠKA, *supra* note 1, at 4 n.4; *see also* Langbein, *supra* note 80, at 1172. I believe that this is an overstatement, or at least subject to misunderstanding. Macnair and I hope to show that some aspects of what became modern hearsay law were well-established, sometimes startlingly so, by the middle of the 17th century. Certainly, there was an identifiable law of evidence, some features of which are recognizable today, before the time of Geoffrey Gilbert, who died in 1726; Gilbert's treatise, *see* GEOFFREY GILBERT, *THE LAW OF EVIDENCE* (Garland Publ'g, 1979) (1754), was not the first broad attempt to articulate evidentiary law. *See, e.g.,* GILES DUNCOMBE, *TRIALS PER PAIS, OR THE LAW OF ENGLAND, CONCERNING JURIES BY NISI PRIUS* 181-248 (R.H. Helmholz & Bernard D. Reams Jr. eds., William S. Hein & Co. 1980) (1682). Langbein is correct, however, that until late in the 18th century much of the law of evidence did not have the relatively consistent exclusionary effectiveness with which we associate it today.

114. By the "modern conception of probability," I mean a concept of uncertainty subject to rigorous mathematical treatment and capable of being applied both to the outcomes of chance processes and degrees of belief in propositions. *See* IAN HACKING, *THE EMERGENCE OF PROBABILITY* 1, 6, 11-12 (1975). In 1654, a correspondence between Pierre de Fermat and Blaise Pascal showed how complex problems concerning probabilities in games of chance could be solved by careful mathematical approaches. *See* F.N. DAVID, *GAMES, GODS AND GAMBLING: THE ORIGINS AND HISTORY OF PROBABILITY AND STATISTICAL IDEAS FROM THE EARLIEST TIMES TO THE NEWTONIAN ERA* 70-97 (1962). This correspondence is traditionally recognized as "the beginning of mathematical probability theory." LORRAINE DASTON, *CLASSICAL PROBABILITY IN THE ENLIGHTENMENT* 15 (1988). Three years later, Christianus Huygens published the first systematic mathematical treatment of probability, *see* CHRISTIANUS HUYGENS, *DE RATIOCINIIS IN LUDO ALEAE* (London, S. Keimer 1714) (1657), a work of widespread and longstanding significance, *see* DAVID, *supra*, at 110-16, 132 (describing the impact of Huygens's work). In the preceding period, according to Hacking, "probability" was determined not by evidential support, but by approval or support from respected people. *See* HACKING, *supra*, at 22-23. This characterization, however, is controversial. *See* James Franklin, *The Ancient Legal Sources of Seventeenth-Century Probability*, in *THE USES OF ANTIQUITY* 123, 133 (Stephen Gaukroger ed., 1991) (contending that probability as used in law did indeed mean "well supported by evidence"). *See generally* PETER L. BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* (1996); DASTON, *supra*, at 6-15 (summarizing scholarship on the early history of probability).

115. *See* SHAPIRO, *supra* note 81, at 7. As Shapiro writes:

The attempt to build an intermediate level of knowledge, short of absolute certainty but above the level of mere opinion, was made by an overlapping group of theologians and naturalists. For the Protestant theologians, who rejected Roman Catholic assertions of infallibility, the central question was whether religious truths, such as the existence of God, miracles, the biblical narratives, and various doctrines and practices of the church, could survive skeptical attack, once they were stripped of claims to absolute truth and reduced to claims based on evidence. For the naturalists, the central problem was that of making truthful statements about natural phenomena which could be observed but could not be reduced to the kinds of logical, mathematical demonstrations that traditionally had been thought to yield unquestionable truths. Both groups concluded that reasonable men, employing their senses and rational faculties, could derive truths that they would have no reason to doubt.

movement. Hostility to hearsay testimony was common in nonlegal settings as well as in English law.¹¹⁶ Thus, in a nonlegal religious publication written around 1670, Sir Matthew Hale argued: "That which is reported by many Eyewitnesses hath greater motives of credibility than that which is reported by few . . . and finally, that which is reported by credible persons of their own view, than that which they receive by hear-say from those that report upon their own view."¹¹⁷

It is not surprising, then, that Geoffrey Gilbert's hugely influential treatise on the law of evidence,¹¹⁸ first published in 1754 but written several decades earlier,¹¹⁹ begins with an explicitly probabilistic analysis of the quality of evidence, closely following the schema of John Locke's *Essay Concerning the Human Understanding*.¹²⁰ (Indeed, Gilbert published an abstract of the *Essay* around the time he wrote the evidence treatise.)¹²¹ This emphasis on probability has persisted over the centuries within the common law system.¹²²

Id. (citations omitted); see also LEEUWEN, *supra* note 81, at xiii (speaking of the Protestant view of "several levels of certainty," intended "to avoid both dogmatism with its claim to absolute certainty and skepticism with its denial of the possibility of any knowledge whatever"); Franklin, *supra* note 114, at 139 (contending that "[t]he first connection noticed between dice and the evaluation of evidence, and the first use of the word 'probability' in connection with gambling," occur in a 1638 work that "attacks the Catholic demand for certainty in matters of religion" (citing William Chillingworth's 1638 *The Religion of Protestants—a Safe Way to Salvation*)).

116. See SHAPIRO, *supra* note 81, at 198. As Shapiro explains:

Early modern historians, both English and Continental, frequently made reference to the Polybian critique of hearsay. Naturalists of the seventeenth century, anxious to eliminate fable and imaginary flora and fauna from natural history, also emphasized the necessity of firsthand and corroborating testimony. Anglican theologians seeking to demonstrate the validity of Scripture emphasized the superiority of firsthand over hearsay testimony.

Id. at 198-99.

117. MATTHEW HALE, *THE PRIMITIVE ORIGINATION OF MANKIND* 129 (London, William Godbid 1677).

118. See GILBERT, *supra* note 113.

119. Gilbert died in 1726. For an inquiry into when he wrote the treatise, see Michael Macnair, *Sir Jeffrey Gilbert and His Treatises*, 15 J. LEGAL HIST. 252, 266-67 n.107 (1994). Macnair concludes that Gilbert wrote the evidence treatise before 1710. See *id.*

120. Gilbert begins as follows:

The first Thing to be treated of, is the Evidence that ought to be offer'd to the Jury, and by what Rules of Probability it ought to be weigh'd and consider'd. In the first Place, it has been observed by a very learned Man, that there are several Degrees from perfect Certainty and Demonstration, quite down to Improbability and Unlikeliness, even to the Confines of Impossibility; and there are several Acts of the Mind proportion'd to these Degrees of Evidence, which may be called the Degrees of Assent, from full Assurance and Confidence, quite down to Conjecture, Doubt, Distrust, and Disbelief. Now what is to be done in all Trials of Right, is to range all Matters in the Scale of Probability, so as to lay most Weight where the Cause ought to preponderate, and thereby to make the most exact Discernment that can be in Relation to the Right.

GILBERT, *supra* note 113, at 1-2; see also JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (Peter H. Niddich ed., Oxford Univ. Press 1975) (1690). Macnair has stated his longstanding view that the ideas Gilbert borrowed from Locke were themselves legal in origin. See e-mail from Marshall Macnair (Oct. 8, 1997) (on file with author). Barbara Shapiro has come to the same conclusion. See Barbara Shapiro, *The Concept "Fact": Legal Origins and Cultural Diffusion*, 26 ALBION 1, 1 & n.1, 24-26 (1994).

121. See GEOFFREY GILBERT, *AN ABSTRACT OF THE ESSAY OF HUMAN UNDERSTANDING* 19-22 (1709) (discussing probability).

122. It appears that in the early years of formal probability theory, the connections between theories of legal evidence and theories of probability were drawn in the Continental system as well. Indeed, it is

Culling Anglo-American writings on evidence from the time of Gilbert to the modern era, William Twining has articulated the "rationalist tradition" in evidence.¹²³ One of its cornerstones is the proposition that "[t]he establishment of the truth of alleged facts in adjudication is typically a matter of probabilities, falling short of absolute certainty."¹²⁴

One can see the effects of this approach in common law attempts to articulate standards of persuasion in probabilistic terms, with the frank acknowledgment that the need for decision may require judgment notwithstanding enormous doubt as to accuracy.¹²⁵ This approach, it seems to me, is more candid than the Continental search, described by Damaška, for the factfinder's *conviction intime* or "full conviction"—in some jurisdictions, even in civil cases.¹²⁶ The problem of how confident we must be in the truth of the claimant's case to hold for the claimant is a universal one, not adequately addressed by Damaška's suggestion that, in the Continental system, it may be "the judge, rather than the party, who failed to carry the burden of establishing facts."¹²⁷ It is one party or the other, and not the judge, who must lose for failure to establish facts. Much the same can be said about the burden of production. This burden undoubtedly takes on a "distinctive character and greater importance" in the adversary system.¹²⁸ But if we recast it as a *risk of insufficiency*, we can see that it too reflects a universal problem: the unshakable question of who loses with respect to a given proposition if the evidence on that proposition is paltry.

interesting to note that the French probability theorist Fermat and the Dutch probability theorist Huygens were both lawyers. See DAVID, *supra* note 114, at 71, 111; Franklin, *supra* note 114, at 125. Moreover, according to Daston,

legal theories of evidence supplied probabilists with a model for ordered and even roughly quantified degrees of subjective probability. The hierarchy of proofs within Roman and canon law led mathematicians to conceive of degrees of probability as degrees of uncertainty along a graduated spectrum of belief, ranging from total ignorance or uncertainty to firm conviction or 'moral' certainty.

DASTON, *supra* note 114, at 14. The Roman-canonical hierarchy of proof was overthrown in favor of the principle of free proof in the legal revolution that followed in the wake of the French Revolution. See DAMAŠKA, *supra* note 1, at 20-21. One factor behind the overhaul may have been that the hierarchy of proof did *not* accurately track probability theory, because it dealt in discrete levels rather than in continuous gradations, and the bureaucratically oriented Continental system was too rigid to adapt without "radical surgery." *Id.* at 151. In any event, as I describe below, it appears that the modern Continental approach to proof reflects probability considerably less than does the common law. See *infra* notes 126-128 and accompanying text.

123. See WILLIAM TWINING, *RETHINKING EVIDENCE* 32-91 (1990).

124. *Id.* at 71, 73 tbl.1. Twining acknowledges commentary by Continental scholars who argue that the model of adjudication he describes fits inquisitorial models better than adversarial ones. See *id.* at 76-77, 81-82. Whether or not that is so, the fact remains that Twining's description of the assumptions underlying rationalist theories of evidence and proof have been drawn from Anglo-American writings. I suspect that it would be difficult to draw a similar account from Continental writings.

125. See, e.g., *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (arguing that the trier of fact in a judicial proceeding "cannot acquire unassailably accurate knowledge of what happened," but only a belief as to what probably happened).

126. See DAMAŠKA, *supra* note 1, at 40 n.29, 114 n.78.

127. *Id.* at 83.

128. *Id.* at 82.

The definition of relevant evidence—perhaps the most fundamental concept in the rationalist scheme¹²⁹—is articulated in explicitly probabilistic terms.¹³⁰ The cognate concept of probative value—really a cardinalization of the concept of relevance—is also inherently probabilistic. And the rationalist approach might help to explain both what Damaška properly terms the Anglo-American system's preoccupation with "foundational" matters¹³¹ and its receptivity to information bearing on credibility.¹³² The value of evidence depends not only on what it is or what it says, but also on its origins.¹³³ To the extent that it appears plausible that the evidence could have arisen by a course of events inconsistent with the proposition for which the evidence is offered, the evidence will lose probative value. Information about the evidence's origins—including any defects in the truth-telling capacity of the witness that might have led her to testify as she did—thus becomes a matter of intense concern, even though it may involve an inquiry a step removed from the primary facts at issue in the litigation.¹³⁴

The rationalist approach appears to reflect a broader tendency to embrace structures that seem analytically sound and probing, even at the expense of theoretical and practical simplicity, and even when the structures themselves create more issues to litigate. Damaška expresses perplexity at the holding of *Martin v. Ohio*,¹³⁵ in which the Supreme Court sanctioned a rule providing that, while the prosecution was required to prove murder beyond a reasonable doubt, the defendant was required to prove self-defense by only a preponderance of the evidence. Damaška notes the "psychological complexities

129. Note the famous passage in JAMES BRADLEY THAYER, *PRELIMINARY TREATISE ON THE LAW OF EVIDENCE* 264-65 (Boston, Little, Brown 1898), stating that the proposition that irrelevant evidence is inadmissible is "not so much a rule of evidence as a presupposition involved in the very conception of a rational scheme of evidence." See also FED. R. EVID. 402 (requiring relevance).

130. See FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action *more probable or less probable* than it would be without the evidence." (emphasis added)).

131. DAMAŠKA, *supra* note 1, at 63.

132. I believe that, in analyzing the common law treatment of credibility, Damaška puts too much emphasis on the division between judge and jury. He draws a distinction between the *relevance* of evidence, depending "solely on the cognitive potential of the information," and the *weight* of evidence, depending also "on the credibility of the information's transmitter." *Id.* at 55. (This does not strike me as the best way of drawing the distinction, which is really one of convenience. Relevance is a binary, yes-or-no term, and weight a matter of degree; we could replace the term irrelevant by "no weight" and lose nothing in the analysis.) He then indicates that relevance is determined by the judge and weight by the jury. See *id.* at 56. This is an overstatement. The jury, where there is one, is generally left free, within broad bounds, to determine how probative evidence is. The bounds are particularly broad with respect to judgments of credibility, a matter on which courts profess no greater expertise than jurors.

133. I have elaborated on this idea in a prior review essay. See Richard D. Friedman, *Still Photographs in the Flow of Time*, 7 YALE J.L. & HUMAN. 243 (1995) (review essay).

134. On the Continent, according to Damaška, analysis of the potential probative value of information includes assessment of the reliability of the transmitter. See DAMAŠKA, *supra* note 1, at 55. I suspect, however, that Continental courts are not as receptive as common law courts to information that is unrelated to the case except insofar as it bears on the credibility of a witness.

135. 480 U.S. 228, 236 (1987).

in this mandate of the law—if it is taken seriously.”¹³⁶ From an American perspective, however, it reflects a plausible application of decision theory in weighing different types of errors differently, assuming (as the Ohio lawmakers may well have believed) that an inaccurate finding that the defendant committed the killing is far worse than an inaccurate finding that he was not acting in self-defense.¹³⁷ Thus, too, American courts adhere to the doctrine of conditional relevance, an attempt—overly rigid as classically articulated, but useful if applied sensitively—to set out meticulously the dependence of one uncertain proposition on another.¹³⁸ And thus, too, they pay a great deal of attention to the distinction between fact and law, a distinction that Continental jurists do their best to avoid.¹³⁹

D. Summary

As I have attempted to show, the three aspects of the common law evidentiary system discussed in this part—the focus on individual rights, the desire for legal uniformity, and the rationalist approach—explain a great deal of the landscape of Anglo-American evidentiary law, not only in its broad features but also in its doctrinal outcroppings. In addition, as I explain in the next part, these three aspects help explain the existence and the persistence of the institutional pillars on which Damaška puts great weight.

III. INSTITUTIONAL PILLARS

Damaška believes that much about the common law evidentiary system can be explained by the three institutional pillars he identifies—the divided trial court, compressed trials, and the adversary system.¹⁴⁰ These institutional aspects of the evidentiary system are unquestionably significant. But I believe

136. DAMAŠKA, *supra* note 1, at 92 n.36.

137. I do not mean to imply that *Martin*, decided by a 5-4 vote in the Supreme Court, was a simple case. Ohio defines murder, however, as “purposely, and with prior calculation and design, caus[ing] the death of another.” OHIO REV. CODE ANN. § 2903.01 (Anderson 1991). At least arguably, self-defense need not negate any of the elements of the crime. *See Martin*, 480 U.S. at 233-34. *But see id.* at 237-40 (Powell, J., dissenting) (contending that, in this case, the defense did negate the “prior calculation and design” element, and so the burden should not be imposed on the defendant).

138. *See supra* Subsection I.B.5.

139. *See DAMAŠKA, supra* note 1, at 53-54 (arguing that “problems pertaining to fact-finding that are expressly regulated and highly visible in the fish-bowl world of jury trials remain veiled from view in Continental procedure, shrouded by the secrecy of the deliberation room,” and attributing the difference to “the internal division of the tribunal into two parts—each part deciding separately and in isolation from the other”); Jescheck, *supra* note 79, at 252 (“The separate treatment of the question of law and that of fact seems to us somewhat arbitrary, as the selecting and examining of the relevant facts depends upon a proper understanding of the law.”). Clearly, the fact-law distinction is related to the adversary system and the division between the court and the jury, two of Damaška’s institutional pillars. I believe, however, that the problem is more fundamentally one of separating out the determinations that should be made at trial from those that should be made at higher levels.

140. *See supra* text accompanying notes 7-8.

that Damaška, in large part because he pays relatively little attention to the features I discussed in Part II, puts too much weight on these institutions as sources of the observable characteristics of evidentiary law. The converse formulation, in fact, is more accurate: The individual rights orientation and (to a lesser extent) the other characteristics I have described account to a considerable extent for these institutions. In this part, I analyze each of Damaška's pillars.

A. *The Archetypal Trial Court*

Damaška's first pillar is the classical trial court of the common law system, presided over by a professional judge and using a collective body of laypeople, the jury, as factfinders. In examining the impact of this system on the Anglo-American evidentiary system, the factors I discussed in Part II are important for two reasons.

First, the institution of the jury did not originate accidentally. As I contended in Part II, the jury reflects political values of long and deep standing and has long been regarded as a significant protection of individual freedom.¹⁴¹ To a large extent, then, the rights orientation provides the bedrock on which this pillar rests. As Damaška discusses, the archetype of the jury trial has lost importance in recent years.¹⁴² The civil jury has practically disappeared from several common law jurisdictions, including England,¹⁴³ and in the United States much litigation has been shunted to alternative forms to avoid the jury.¹⁴⁴ Nevertheless, the system remains important in American civil litigation.¹⁴⁵ And in criminal cases, the jury retains great importance throughout the common law world.¹⁴⁶ This continued—and differential

141. See *supra* Section II.A.

142. See DAMAŠKA, *supra* note 1, at 126-27.

143. See *id.* at 126 & n.4.

144. Such alternative forms include arbitration and administrative proceedings. See *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 460-61 (1977) ("[T]he right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved.").

145. Damaška attributes the strength of the civil jury in the United States to constitutional protection. See DAMAŠKA, *supra* note 1, at 126 n.4. That is only part of the story, however. The Seventh Amendment has never been incorporated against the states, and so it guarantees civil juries only in federal cases. Given the relative ease with which state constitutions are amended, the universality of civil juries throughout the United States suggests a strong continued attachment to them. Note also that the ambit of the civil jury has recently been expanded in one important respect: Since 1991 legislation, the jury right is applicable in most Title VII litigation. See *Civil Rights Act of 1991*, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073 (codified at 42 U.S.C. § 1981a (1994)).

146. It may be that the system is being undermined to a slight extent by sentencing guidelines that place great weight on misconduct that is not tried by the jury in the case. See *Witte v. United States*, 515 U.S. 389 (1995) (upholding the consideration in sentencing of relevant conduct not adjudicated in the case at hand). This does not reflect a major change, however. Indeed, if sentencing guidelines achieve their goal of limiting judicial discretion, on balance they give increased importance to (the jury's) determinations of guilt. A more serious threat to the jury system is the prevalence of plea bargaining. Still, plea bargaining supplants formal factual determination altogether; it does not replace jury factfinding by an alternative

—level of importance is less reflective of confidence in the jury's abilities as factfinder than it is of the enduring (albeit weakened) force of the political values that have long supported the jury.

Second, if I am right that these factors explain much of the common law evidentiary system, one might approach somewhat skeptically explanations treating the structure of the trial court as having critical importance. That is, in fact, how I approach the four considerations raised by the archetypical trial court that Damaška investigates—both the more commonly cited one (having to do with the shortcomings of lay decisionmaking), to which he does not accord much significance, and the more novel ones (having to do with the collective character of the jury, the need to compensate for cryptic verdicts, and the divided nature of the common law trial court), to which he does.

1. *Shortcomings of Lay Decisionmaking*

As I have already suggested,¹⁴⁷ Damaška is quite right in arguing that the supposed cognitive inabilities of lay jurors are of far less significance in justifying exclusionary rules than is often supposed.¹⁴⁸ Damaška properly argues that there is no good basis for believing that jurors are so deficient relative to a judge in considering evidence as to justify wide-ranging exclusionary doctrines when a jury is the factfinder, but not when a judge is. I would go further, arguing on an absolute as well as a differential basis. That is, I contend that if an extraordinarily wise decisionmaker would accord an item of evidence significant probative value, then truth determination will usually be helped rather than hurt by presenting the evidence to a real factfinder, whether the factfinder is a judge or a jury. At the same time, though, as I suggested in Section II.B, there is another sort of defect of lay decisionmaking that *is* significant: a shortened perspective that can lead to uses of information in ways that tend to disregard legal norms.

2. *The Collective Character of the Jury*

Damaška stresses the collective character of the jury as a rationale for certain provisions of the common law evidence system: There is, he claims, a “need . . . to give structure to communication among amateur

system. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932 (1983) (“Plea bargaining . . . substitutes a regime of split-the-difference for a judicial determination of guilt or innocence . . .”).

147. See *supra* Section I.A.

148. See DAMAŠKA, *supra* note 1, at 28-37. Damaška also makes the interesting and plausible point that the factfinding function of the jury may indeed be taken as a factor weighing “against saturation of factfinding activities by law,” because that function requires the implementation of often complex legal principles by laypersons. *Id.* at 26.

adjudicators.”¹⁴⁹ Thus, limited admissibility rules and evidentiary instructions are best understood “as devices directed at influencing group deliberations.”¹⁵⁰ In Part I, I offered other ways of understanding such rules and instructions, but Damaška’s point is an interesting one; it seems likely that, as a general rule, discourse is more easily constrained than thought is, and therefore the former may be the more useful target of jury instructions. Damaška substantially overstates the point, however. Recognizing the collective nature of the audience of instructions does not make the instructions any more coherent; given this incoherence, the fact that they are addressed collectively merely means that they are likely to be flouted collectively. And, as Damaška acknowledges, collective verdicts most often follow the individual jurors’ inclinations.¹⁵¹

3. *Compensating for Cryptic Verdicts*

Damaška argues that because the output of the jury—its verdict—is so opaque and therefore so difficult to challenge, the common law system finds a “palliative” by more aggressively regulating the jury’s input, the “suitability of the database” supplied to it.¹⁵² Once again, the point has some merit but seems overstated. For one thing, even when an inscrutable jury is the factfinder, we do in fact have output control, sometimes before the output is actually created: Judgment as a matter of law in the American system may be granted on the pleadings,¹⁵³ by summary judgment after a suitable opportunity for discovery,¹⁵⁴ or at trial, before or after the case actually goes to the jury.¹⁵⁵ Given the deference paid to judicial factual findings,¹⁵⁶ it is not at all clear that an opaque jury verdict necessarily entails weak output control. Indeed, the question of whether to control output before the factual findings are actually made cannot be substantially affected by the question of whether the output would eventually be articulate or not; in any event, the issue is whether the anticipated or actual evidence is sufficient to support a verdict for the party resisting early judgment. Output control after factual findings are made is somewhat easier and more satisfactory if the findings are articulate—a reviewing court need only inquire whether the findings actually made were sufficiently supported, whereas the court must try to reconstruct a plausible

149. *Id.* at 37.

150. *Id.* at 40.

151. *See id.* at 38; *see also* HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 488 (1966) (stating that “with very few exceptions the first ballot decides the outcome of the verdict,” and so “the real decision is often made before the deliberation begins” (emphasis omitted)).

152. DAMAŠKA, *supra* note 1, at 44.

153. *See* FED. R. CIV. P. 12(b)(6), (c).

154. *See* FED. R. CIV. P. 56.

155. *See* FED. R. CIV. P. 50.

156. *See supra* note 40 and accompanying text.

line of reasoning from an inarticulate verdict. In most cases, however, the line of reasoning that the jury is likely to have taken is plain. And, as Damaška acknowledges, even a demand for articulated factual findings may yield post hoc argument on the part of the court reviewing the findings, rather than the factfinder's actual course of reasoning.¹⁵⁷

Apart from this, input control is a very poor remedy for weakness of output control. If an item of evidence will tend to lead the factfinder toward the truth rather than away from it, then presumptively it ought to be presented, regardless of whether the finding of fact will be articulated. By the same token, if an item of evidence degrades the database, it ought to be excluded, regardless of whether the finding of fact will be articulated. Thus the need to compensate for weakness of output control has probably not exerted great force on evidentiary decisionmakers to impose significant input restrictions.

4. *The Divided Trial Court*

Finally, Damaška argues that the very fact of the trial court's division into two parts—one that can make admissibility decisions and another that will not receive evidence held inadmissible—has a significant impact in “creat[ing] a space for the growth of evidentiary doctrines and practices.”¹⁵⁸ I agree with Damaška to a great extent: “[T]he problem of unbiting the apple of knowledge”¹⁵⁹ makes enforcement of some exclusionary rules difficult, and perhaps not worthwhile, when the decisionmaker is unitary. Once again, however, the point must not be taken too far.

First, institutions are not exogenous to the system. If we care sufficiently about the exclusionary rules, we will shape our institutions to protect them.¹⁶⁰ One could easily imagine an expedient that could protect much of the strength of those rules and yet allow an undivided tribunal at trial: Pretrial motions to exclude evidence, which are often made even when there will be a jury trial, could routinely be made before another judge. Such a temporal division would not remove all apple-unbiting problems, but it would go a significant distance in that direction.¹⁶¹

Second, it must again be remembered that only part of the force of exclusionary rules lies in their effect on the factfinder's consideration of evidence. Exclusionary rules frequently have decisive importance in determining sufficiency questions—that is, in determining whether the

157. See DAMAŠKA, *supra* note 1, at 43-45.

158. *Id.* at 46-47.

159. *Id.* at 50.

160. Indeed, the desire to protect some exclusionary rules may be a factor strengthening support for the jury system, at least in criminal trials.

161. Damaška also mentions the possibility of a tribunal with two separate professional parts. See DAMAŠKA, *supra* note 1, at 27 & n.2.

factfinder, judge or jury, has a sufficient basis for reaching a given conclusion at all.¹⁶² Thus, exclusionary rules do not take on nearly so much of an “ethereal quality” absent division of the tribunal as Damaška suggests.¹⁶³

5. Summary

In short, Damaška is clearly right that the structure of the archetypal common law trial court has a significant impact on evidentiary law and that the impact is different from that commonly supposed. The cognitive incapacities of juries are, as he argues, probably less important in explaining evidentiary law than is commonly supposed. But the danger that the jury will act on its own short-term policy instincts is real. And I believe that Damaška places too much emphasis on the structure of the court as a foundation for many evidentiary rules.

Two Janus-like points may emerge from this analysis. First, if an exclusionary rule is not justified by some reason unrelated to the presence of the jury as factfinder, then the rule is probably not justified by the presence of the jury. Second, if an exclusionary rule does reflect fundamental rights or substantial policy objectives—as I argued in Part II that some exclusionary rules do—then the presence of the jury as factfinder is by no means an essential, or even particularly important, condition for maintaining it.

Hearsay law reflects both points. It appears that the near abolition of the civil jury in Britain has acted as a catalyst for the abolition of the civil rule against hearsay;¹⁶⁴ similarly, it is commonplace for judges in bench trials to ignore the hearsay exclusion. I do not believe, however, that this catalytic effect has arisen in substantial part because the replacement of the jury as factfinder *in fact* makes hearsay a more satisfactory form of evidence. Instead, it has arisen because the *rhetoric* of hearsay doctrine has for so long put such stress on the supposed incapacity of the jury. Looking beyond the rhetoric, the case for a more receptive attitude toward civil hearsay is very powerful even if a jury acts as factfinder. Correspondingly, arguments based on the fundamental right to confrontation continue to support exclusion of some forms of hearsay offered against a criminal defendant. As suggested by recent

162. See *supra* Subsection I.B.4.

163. DAMAŠKA, *supra* note 1, at 127.

164. See, e.g., Civil Evidence Act, 1995, ch. 38, § 1. The Act resulted from a recommendation by the Law Commission for England and Wales, which emphasized “the greatly reduced use of juries in civil trials other than for defamation proceedings.” THE LAW COMM’N FOR ENG. AND WALES, CONSULTATION PAPER NO. 117, THE HEARSAY RULE IN CIVIL PROCEEDINGS 52 (1991). For a canvass of the law of hearsay and reform proposals in other common law jurisdictions, see *id.* at 112-30. The history in Scotland is similar. See Civil Evidence Act, 1988, ch. 32, § 2 (abolishing the rule against hearsay in civil cases); SCOTTISH LAW COMM’N, NO. 100, EVIDENCE: REPORT ON CORROBORATION, HEARSAY AND RELATED MATTERS IN CIVIL PROCEEDINGS 16-17 (1986) (emphasizing the limited use of the civil jury); *id.* at 23 (recommending the abolition of the rule against hearsay).

Continental developments that Damaška finds surprising,¹⁶⁵ the absence of a jury does not undermine these arguments.

B. *Concentrated Proceedings*

Damaška's second pillar is the common law form of the continuous trial. This concentrated form, which contrasts with the more episodic form of many trials in Continental Europe, is attributable in part to the archetype of the jury as factfinder—lay jurors have other things to do and cannot easily commit to long, open-ended proceedings.¹⁶⁶ Concentration is not only a practical necessity, however; to some extent, it is a desideratum as well, and Damaška notes that Continental courts are moving in this direction.¹⁶⁷

Anglo-American proceedings, on the other hand, have acquired some of the attributes of episodic proceedings without altering the concentration of the trial itself. Pretrial proceedings have grown tremendously in importance in this century. Discovery in civil proceedings, and in many criminal ones as well, provides for an extended, highly episodic opportunity to gather information from various sources—friendly, neutral, and hostile—and to follow up on what these reveal. Very often, the key adjudication in a case is not a verdict at trial, but a ruling on a motion for summary judgment, which assesses the sufficiency of the evidence gathered for trial and presented on paper to the court. If summary judgment is granted properly, the case ends; if it is denied, the case likely settles. If the case does proceed to trial, discovery minimizes the chances of surprise, and a pretrial order may well ensure that the evidence is not only assembled and shared, but also confined and ordered before trial. Moreover, much of the evidence presented at trial may have been set beforehand—not only documents and other tangible evidence but increasingly testimony also, in the form of depositions.¹⁶⁸ The trial remains the show, but to a great

165. The European Court of Human Rights has issued several significant decisions under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the confrontation right. *See, e.g.,* Saïdi v. France, 261 Eur. Ct. H.R. (ser. A) at 58 (1993); Kostovski v. Netherlands, 166 Eur. Ct. H.R. (ser. A) at 23 (1989). Damaška's reaction is detailed below. *See infra* text accompanying note 203. I have discussed this line of decisions elsewhere. *See* Richard D. Friedman, *Confrontation Rights of Criminal Defendants*, in *PROCEEDINGS OF THE FIRST WORLD CONFERENCE ON NEW TRENDS IN CRIMINAL INVESTIGATION AND EVIDENCE* 533 (J.F. Nijboer & J.M. Reijntjes eds., 1997).

166. The traveling nature of many English courts contributed to making episodic trials generally unfeasible. A standard history of the itinerant courts is J.S. COCKBURN, *A HISTORY OF ENGLISH ASSIZES*, 1558-1714 (1972).

167. *See* DAMAŠKA, *supra* note 1, at 59.

168. Videotaping of depositions has become much more common in recent years and since 1993 has received explicit sanction in the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 30. Videotaping the depositions of expert witnesses for use at trial, thus avoiding the need to pay the expert for her waiting time at trial, has become routine practice in some jurisdictions. *See, e.g.,* FLA. R. CIV. P. 1.390(b) (providing that "[t]he testimony of an expert or skilled witness may be taken at any time before the trial in accordance with the rules for taking depositions"). Arizona has gone so far as to allow general use of depositions instead of live testimony without a need to show unavailability of the witness or to secure the consent of the adversary. *See* ARIZ. R. CIV. P. 32(a).

extent it is a prepackaged product.

Damaška recognizes these changes, of course, and he describes some of them himself.¹⁶⁹ His essential point is that evidentiary arrangements that made sense when the pillar of trial-centeredness stood strong no longer make sense as that pillar is crumbling. I agree, but only in part. In explaining why, I will concentrate on two of Damaška's examples, hearsay and foundational matters.

With respect to hearsay, if a proponent presents the statement of an out-of-court declarant who could have been a live witness, a "best evidence" rationale for excluding the evidence arises: Exclusion will likely induce this proponent, or at least others in a similar position, to present evidence that is better than the prior declaration—the live testimony of the declarant. But if the opponent has time to react, either because the trial is episodic or because there has been sufficient pretrial preparation, it becomes a more feasible response to say to the opponent, in effect, "If you want to examine the declarant, produce her as a witness yourself. And if you want to dig up impeachment material on her, you have (or have had) sufficient opportunity to do so." In this sense, the decline of trial-centeredness weighs against excluding hearsay.

With respect to foundational matters, Damaška emphasizes that, in episodic trials, courts may not need to insist on answers to foundational questions when the evidence is first introduced.¹⁷⁰ Neither do courts in concentrated proceedings, however; admitting evidence subject to later connection is routine practice in common law courts.¹⁷¹ The better argument in Damaška's favor is similar to the one concerning hearsay. Evidence without a foundation, such as a document lacking authentication, is inferior to the same evidence accompanied by the foundation. A ruling excluding the evidence unless the proponent produces the foundation may induce this proponent (or future proponents similarly situated) to do so. But if the opponent has sufficient time to react, it becomes more feasible to say, "If you really want to challenge the authenticity of this genuine-looking document, you will have your chance. Meanwhile, it will be admitted."¹⁷²

Caveats are in order, however. First, we cannot say that evidentiary law has been nonresponsive—"adrift"—in these regards. Restraints against hearsay, especially civil hearsay, have been loosening up throughout the common law

169. See DAMAŠKA, *supra* note 1, at 129.

170. See *id.* at 63-64.

171. See FED. R. EVID. 104(b) (providing for the admission of evidence "upon, or subject to," the introduction of evidence sufficient to find a foundational fact).

172. I have elsewhere argued for such an approach. See Friedman, *Conditional Probative Value*, *supra* note 60, at 452-53, 476-77; Friedman, *Refining Conditional Probative Value*, *supra* note 60, at 464-65; see also Nance, *supra* note 60, at 445-53 (discussing such an approach).

world,¹⁷³ as have foundational standards.¹⁷⁴ Second, we should not exaggerate the degree of surprise in a trial-centered setting. It seems unlikely that, before the advent of modern discovery, opponents were usually surprised by the most important hearsay offered against them; for the most part, I believe, they had time to react before trial. Similarly, I suspect that, even in truly compressed proceedings, important surprise evidence posing serious foundational questions was more the exception than the norm.

Most important, the decline of trial-centeredness leaves some rationales and situations essentially untouched. A large part of the remaining attachment to foundational requirements stems from an intellectual habit of regarding the foundation as indeed foundational—that is, as a set of propositions absent which the evidence is intolerably weak. Even if divorced from the institution of trial-centeredness, then, foundational requirements would have roots in the rationalist framework I discussed in Part II. As for hearsay, the decline of trial-centeredness has substantial importance only with respect to certain types of out-of-court statements: those by declarants whom the proponent could have produced but did not. It has little impact with respect to hearsay by declarants who are dead or otherwise unavailable¹⁷⁵ or, for that matter, by those who actually testify live at trial.¹⁷⁶ And it provides very little support for admissibility of what I described in Part II as the most troublesome type of

173. See *supra* notes 164, 168 and accompanying text. The wide-open residual exceptions to the rule against hearsay have recently been moved from Rules 803 and 804 to a separate home of their own, Rule 807, to make room for more enumerated exceptions. See FED. R. EVID. 807 advisory committee's note. The Law Commission for England and Wales has recently issued a report recommending substantial limitations on the rule against hearsay in criminal cases. See THE LAW COMM'N FOR ENG. AND WALES, NO. 245, EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS 54 (1997) (emphasizing the rule's "exclusion of cogent evidence"); *id.* at 194-201 (recommending, *inter alia*, a broad qualified exception for statements by unavailable declarants and a discretionary "safety-valve" exception).

174. See FED. R. EVID. 901 advisory committee's note. As the note reads:

Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least *prima facie* genuine items of the kind treated in Rule 902 . . .

Id.; see also FED R. EVID. 902 advisory committee's note ("The present rule collects and incorporates these situations [in which self-authentication is allowed], in some instances expanding them to occupy a larger area which their underlying considerations justify.").

175. The decline of trial-centeredness may have some impact in such cases: An opponent with greater notice can at least produce information impeaching the declarant, even though he cannot confront the declarant herself.

176. Damaška notes that, in the Continental system, when an out-of-court declarant's statement is reported in court, "there is enough time . . . to seek out this person for presentation in court . . . [a]nd if this person's court testimony differs from that quoted by the hearsay witness, the court has heard them both and is thus in position to evaluate the relative trustworthiness." DAMAŠKA, *supra* note 1, at 65. This argument echoes one sometimes made in American discourse in favor of admissibility of prior statements. See, e.g., *Di Carlo v. United States*, 6 F.2d 364, 368 (2d Cir. 1925), *quoted in* FED. R. EVID. 801(d)(1) advisory committee's note; 2 MCCORMICK, *supra* note 45, § 251, at 117-20. I think this argument overlooks the difficulties in cross-examining a witness who fails to assert in court the complete substance of her prior statement. I have discussed these difficulties at considerable length elsewhere. See Richard D. Friedman, *Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket*, 1995 SUP. CT. REV. 277.

hearsay: statements that, if admitted, would amount to out-of-court testimony against a criminal defendant.¹⁷⁷

C. *The Adversary System*

We come now to the third of Damaška's supporting pillars: the adversary system, which he defines usefully as "a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essentially passive."¹⁷⁸ This is probably the most fundamental of Damaška's three pillars—indeed, it is often mistakenly viewed as synonymous with the common law system¹⁷⁹—and it seems to be the most resistant to dramatic change.¹⁸⁰ It plainly has an enormous impact on evidentiary law. Damaška's discussion of the adversary system is rich, subtle, and broad-ranging. I confine myself to making a few points.

Damaška's essential theme is this: "[T]he ultimate objective of all adjudicative proceedings" in the common law system is seen as the "just settlement of controversies,"¹⁸¹ which Damaška refers to variously by such terms as "conflict-solving"¹⁸² or "dispute resolution."¹⁸³ This mission supports the prominent role of the parties in the administration of justice, and it "erects the considerations of disputational fairness—such as the balancing of advantages between the litigants—to the status of values capable of interfering with the search for the truth."¹⁸⁴ It also explains why a competitive factfinding style appears acceptable, even desirable, in common law countries, "despite the departures it entails from ordinary factfinding practices."¹⁸⁵

Damaška's argument that the common law's orientation toward dispute resolution is a key source of its factfinding style is interesting and insightful, but it does not capture the full picture. The mission of the *overall legal process* may be dispute resolution, at least on the civil side, but the mission

177. Conceivably, one could argue that, even in this case, the hearsay should be admitted, given that the accused can produce the declarant as part of his case if he wishes. Perhaps this argument has some merit when the declarant is a child, where the demand for confrontation might be based on the cynical anticipation that, if the demand were granted, the child would be inhibited from testifying. In general, however, I believe the accused should have the right to have an adverse witness brought before him to testify and to be cross-examined as part of the prosecution's case—not a right to bring her to court later (assuming he could do so) as part of his own case, examining her while also giving her the opportunity to repeat her story.

178. DAMAŠKA, *supra* note 1, at 74.

179. That both Anglo-American and Continental systems are varying hybrids of adversarial and inquisitorial features is one of the pervasive themes of Damaška's celebrated earlier book. See DAMAŠKA, *supra* note 15, at 4-6, 97-98.

180. See DAMAŠKA, *supra* note 1, at 134.

181. *Id.* at 110.

182. *Id.* at 122.

183. *Id.* at 110, 124.

184. *Id.* at 124.

185. *Id.*

of the *adjudicative system* is to determine the rights of the parties as accurately as possible, subject to various constraints. To a large extent, the rights of the parties generate the adversary system. That system has taken on a life of its own, with significant implications for evidentiary law. But many evidentiary restrictions are attributable to rights of the parties or to the other features of the system elaborated in Part II, and they would retain their justification even absent the adversary system.

1. *The Mission of the Adjudicative System*

I have some difficulty with the idea of designating one "mission"¹⁸⁶ for a complex, multi-faceted system that has evolved over centuries in many countries and that is subject to no central direction—especially a system in which, as in a market, most actors are pursuing their self-interest.¹⁸⁷ It seems unlikely to me from the start that so simplistic and abstract a concept could bear the weight of the adversary system. But I will put those doubts aside for this discussion.

Damaška views both criminal and civil litigation in the common law system as preeminently serving the mission of dispute resolution.¹⁸⁸ In the Continental system, on the other hand, he finds that civil litigation is oriented toward dispute resolution but criminal adjudication "primarily serves the realization of state policy toward crime."¹⁸⁹ His chief support for this analysis is that a general principle prevails throughout common law adjudication and in civil Continental adjudication, but not in criminal Continental adjudication, that only contested matters need be resolved.¹⁹⁰ This principle is not universal within the common law system—allocation proceedings in taking a criminal guilty plea serve some of the same purposes as the Continental trial of a criminal who does not deny guilt¹⁹¹—but it is a fair generalization.

186. *Id.* at 75.

187. The market metaphor raises an issue I find perplexing. Even after reading Damaška, it seems to me that those systems dominated by court officials (rather than the parties themselves) face one of the principal problems endemic to bureaucracies operating without the advantage of market pressure, which automatically internalizes costs and benefits. This is the problem of proportion, of how much to spend, in time, money, and other resources, toward a given end. If I were a litigant in an inquisitorial system, I am sure I would always be fearful that the judge was paying too little attention to my case—and if I were a nonlitigant taxpayer, I would be sure that the judges were wasting my money delving deeply into trivialities. The same problem arises in criminal litigation in the Anglo-American system, where the prosecutor is a government lawyer and the defense lawyer is likely not paid by the defendant. On the civil side, at least, this problem is far less severe, for litigation expenses and the benefits, if any, resulting from them are more likely to fall on the same party.

188. *See* DAMAŠKA, *supra* note 1, at 124.

189. *Id.* at 112.

190. *See id.* at 87, 103-04, 111-12, 116.

191. *See* FED. R. CRIM. P. 11(f) ("Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.").

In assessing the significance of this matter, I think it is important to distinguish between the legal process in general and the system of adjudication that forms a part of that process. By definition (or almost so), the legal process, at least on the civil side, is concerned with resolving disputes. It includes all the means by which people may do so—not only adjudication, but informal settlement discussions, more formal means often labeled as “alternative dispute resolution” to distinguish them from adjudication, administrative procedures, and legislative change. Most disputes are resolved without adjudication, but some remain resistant to such resolution. For these, the adjudicative system is at hand.

In a sense, the adjudicative system does not resolve disputes. Indeed, if dispute resolution were the principal goal of our system, we might well ask ourselves why we have such a confrontational adjudicative system rather than one more geared toward finding cooperative solutions. Rather than resolve disputes, the adjudicative system takes disputes that have not been resolved—and that may be irresolvable—and determines and implements the substantive rights of the parties as best it can, subject to constraints such as cost, uncertainty, and the system’s own rules of procedure. Because it is oriented toward adjudicating rights rather than crafting solutions, there is an austerity about the adjudicative system; it is limited in the results it reaches in ways that the parties, were they to deal with one another outside of the adjudicative system, would not be. But this austere procedure is the service it offers when all else fails; we might say that *it* is really the alternative method for dispute resolution—or, in a fitting play on Clausewitz, dispute resolution by other means.¹⁹²

On the criminal side, dispute resolution seems an even poorer characterization of the Anglo-American system. Sometimes, by the time the lawyers are involved, there is no real conflict; the accused knows he has done wrong and must be punished for it. Perhaps more significantly, even if the defense and the prosecution resolve any dispute between them, they usually cannot—as most civil parties can—simply settle the matter between them and avoid court altogether. If criminal punishment is to be imposed, it must be by the court, and the court is not bound, in determining the sentence, by the parties’ agreement.¹⁹³ “The classical liberal concept of the criminal process,”

192. Cf. CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret trans., Princeton Univ. Press 1976) (1832) (“[W]ar is . . . a continuation of political intercourse, carried on with other means.”). Litigation is to war as dispute resolution is to diplomacy, and the analogy is not a distant one. See *American Int’l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1468 (7th Cir. 1996) (Posner, C.J., dissenting) (noting “the emotional and fiercely adversarial character of war with which of course litigation has often been compared”). Even adapting the famous Clausewitz passage to litigation is not original. See *De Sanchez v. Banco Central de Nicar.*, 770 F.2d 1385, 1386 (5th Cir. 1985) (“Clausewitz once described war as politics carried on by other means. Here it could be said that litigation is war carried on by other means.”).

193. See FED. R. CRIM. P. 11(e)(3)-(4) (providing for acceptance and rejection of plea agreements).

as described by Damaška, "as a dispute between the individual and the state"¹⁹⁴ does not hold water, if it ever did. Indeed, Damaška's description of the Continental view of criminal justice as "serv[ing] the realization of state policy toward crime"¹⁹⁵ seems much closer to the mark.¹⁹⁶

What, then, are we to make of party control of the boundaries of legal proceedings—that is, of the general principle emphasized by Damaška that only contested matters need be resolved? The answer most likely lies in our individual rights orientation: The right to proceed to litigation is one that a person can exercise or waive as he chooses. If he does proceed to litigation, he has the right to raise a material issue that appears to favor him; if he does not, it is unlikely that anyone will do it for him.

2. *Rights and the Adversary System*

The relationship between individual rights and the adversary system bears further examination. Reading Damaška, one might gain the perception that, because the common law system is adversarial, it gives litigants a range of rights.¹⁹⁷ There is a measure of truth to that; for the most part, though, viewing matters from this perspective puts the cart before the horse. One indication that rights are prior to adversarialness is the solicitude with which courts treat the rights and interests of those other than the parties originally before them, through such mechanisms as compulsory joinder and intervention,¹⁹⁸ a range of protections for unnamed class members in class actions,¹⁹⁹ and the exercise of broad freedom, unrestrained by the parties' presentations, to determine both the law and the underlying "legislative facts."²⁰⁰

Indeed, to a large extent, what we call the adversary system exists because of, and indeed is the coalescence of, rights of the parties in court.²⁰¹ I cannot mount a full historical demonstration of this proposition, but the history I offered in Part II is strongly suggestive. One might logically expect the deep and strong English attachment to conceptions of individual rights to breed

194. DAMAŠKA, *supra* note 1, at 120.

195. *Id.* at 112.

196. Damaška acknowledges that there is an element of this view in the Anglo-American system. *See id.* at 110 n.69.

197. *See, e.g., id.* at 79 (arguing that, in a system marked by party-driven proceedings, "it is vitally important that each party have an immediate opportunity to challenge sources of information presented by the opponent").

198. *See* FED. R. CIV. P. 19, 24.

199. *See, e.g.,* FED. R. CIV. P. 23(a)(3), (c)(2), (e); *see also* *Amchem Prod., Inc. v. Windsor*, 117 S. Ct. 2231 (1997) (rejecting certification of class under Rule 23(b)(3) on the grounds that the requirements of predominance of common questions and adequacy of representation were not satisfied).

200. *See* FED. R. EVID. 201(a) advisory committee's note; *see also* sources cited *supra* note 112.

201. *See* MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 13 (1990) ("[T]he adversary system represents far more than a simple model for resolving disputes. Rather, it consists of a core of basic rights that recognize and protect the dignity of the individual in a free society.").

demands for, and societal receptivity to, a large role for the parties in litigation. Recall also that the right to confront accusing witnesses became highly visible—at least through defendant demands and parliamentary support—in sixteenth-century treason jurisprudence.²⁰² This occurred long before defense lawyers were generally present at criminal trials, and in the context of a system that, with active judges often sounding like prosecutors, was not adversarial in any modern sense of the term.

We have here, then, at least part of a solution for a problem that appears to perplex Damaška: the fact that, even as support for the rule against hearsay is diminishing in common law countries, Europe appears to be embracing some right of confrontation for criminal defendants.²⁰³ Although the common law hearsay ban is excessively broad, the confrontation right is an important one that has value even in a nonadversarial system. If Europe is becoming increasingly sensitive to that right, so much the better. By doing so, it takes a step toward an adversary system, but the confrontation right in itself does not create such a system.

Now consider some of the panoply of rights of the criminal defendant in the modern American system: the right to have a formal accusation;²⁰⁴ the presumption of innocence and a very high standard of persuasion;²⁰⁵ the right to have the facts tried by a jury,²⁰⁶ which for several centuries has of necessity been a largely passive factfinder;²⁰⁷ the right to effective assistance of counsel;²⁰⁸ the right to confront and cross-examine adverse witnesses;²⁰⁹ and the right to secure helpful evidence.²¹⁰ With just those rights, we could assemble a very substantial—though of course not fully complete—picture of American criminal adjudication and of what gives it an adversarial, combative nature.

On the other hand, note that our system of criminal adjudication is *not* “competitive”—a term sometimes used by Damaška apparently as a synonym

202. See *supra* text accompanying notes 85-86.

203. See DAMAŠKA, *supra* note 1, at 16 n.24, 81, 150 & n.15.

204. See U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .”).

205. See, e.g., *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (holding the presumption of innocence to be “a basic component of a fair trial under our system of criminal justice”); *In re Winship*, 397 U.S. 358, 359 (1970) (setting forth “beyond a reasonable doubt” as the constitutionally required standard of persuasion).

206. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

207. See, e.g., Langbein, *supra* note 80, at 1170-71 (discussing the transformation from self-informing to passive juries).

208. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

209. See *id.* (“[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

210. See *id.* (“[T]he accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .”).

for "adversarial"²¹¹—in the sense of being evenhanded, the way the rules of most contests are. On the contrary, it is rife with asymmetries, and many of these are also attributable to defendants' rights: the presumption of innocence and high standard of persuasion;²¹² the right not to testify;²¹³ the prosecution's obligation to turn over significant evidence to the defense;²¹⁴ and the defendant's ability to present some information to the jury notwithstanding generally applicable evidentiary rules.²¹⁵ Thus, to a large extent, it is individual rights that limit, as well as generate, the adversarial nature of our system.²¹⁶

On the civil side, these asymmetrical rights are absent. Indeed, the emphasis tends to be on a fairness of symmetry.²¹⁷ Because of this greater emphasis on symmetry, Damaška's attempt to paint civil and criminal procedure with the same brush, emphasizing a similarity of mission, is somewhat jarring. Even if, at some broad level, the two types of procedures have similar missions, the constraints under which they operate are radically different, and this gives them shapes that are very dissimilar.

3. *The Adversary System and the Shape of Evidentiary Law*

In emphasizing the importance of individual rights, I do not mean to deny that the adversary system has a significant impact on Anglo-American evidentiary law. The "best evidence" principle discussed above in connection with concentrated proceedings²¹⁸—the idea that excluding an item of evidence may be beneficial in inducing presentation of a substitute that is better from the court's point of view—would make little sense outside the context of a system of party-dominated evidentiary presentation. The fact that the parties, acting in their self-interest, produce the evidence means that there will

211. See, e.g., DAMAŠKA, *supra* note 1, at 99 (referring to the "competitive evidentiary method").

212. See *supra* note 205 and accompanying text.

213. See U.S. CONST. amend. V ("No person . . . shall be compelled in any case to be a witness against himself . . .").

214. See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963).

215. See FED. R. EVID. 404(a)(1)-(2); *Rock v. Arkansas*, 483 U.S. 44 (1987) (holding that the defendant had a constitutional right to testify notwithstanding the applicable state rule excluding testimony by witnesses whose memory had been hypnotically refreshed); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (holding that a murder defendant's due process rights were violated by state evidence rules that barred him from introducing a confession made by another person).

216. Some asymmetries favor the prosecution. For example, in the federal criminal system, in which formal discovery is relatively confined, grand jury proceedings effectively give the prosecutor a nonreciprocal opportunity for discovery. In virtually all jurisdictions, the prosecutor can grant immunity to a witness she thinks will testify favorably, but the defense cannot. These asymmetries, too, take the system away from a norm of competitiveness.

217. The key rights that help to generate the adversarial system—the rights to have assistance of counsel, to gather and present helpful evidence, and to confront adverse testimony—are present, though in significantly altered form. Parties may be represented by counsel, but generally only if they pay for it. The right to gather evidence is, in some respects, stronger in civil than in criminal litigation, while the right to confront adverse testimony is weaker, lacking explicit constitutional support.

218. See *supra* Section III.B.

be a good deal of chaff among the wheat—evidence that, from the court's standpoint, is not worth the time it takes to present or might lead a jury to disregard norms that the law wishes to impose. Furthermore, the adversary system, being so natural a part of common law jurists' approach to adjudication, "grooves sensibilities," in Damaška's phrase.²¹⁹ This factor may lead to broad tolerance for competitive behavior that seems unlikely, in itself, to advance objectives of the adjudicative system (for example, efforts to confuse a truthful witness). Sometimes, too, the system creates pressure for competitive evenhandedness, which is sensible in some circumstances²²⁰ and not in others.²²¹

At the same time, however, we must bear in mind that core aspects of the adversary system reflect deep underlying values. Damaška shows how partisan presentation of the facts departs from the methods used in everyday extrajudicial inquiry, and how the "single integrated inquiry" of Continental proof-taking is much closer to those processes.²²² Putting aside the question of which structure tends to yield more accurate results,²²³ this is clearly correct. Judges in the common law system do have considerable flexibility to alter the usual order of proof so as to "make the interrogation and presentation effective for the ascertainment of the truth."²²⁴ Taken too far, however,

219. DAMAŠKA, *supra* note 1, at 119.

220. *See, e.g.*, FED. R. EVID. 404(a)(1) (allowing the prosecutor to rebut evidence offered by the accused concerning a pertinent trait of his own character).

221. For example, to the extent that concern over symmetry is the reason for limiting criminal defendants' ability to take discovery, *see* DAMAŠKA, *supra* note 1, at 117, I think the argument is unpersuasive because the parties are in such asymmetrical situations from the outset. *Cf.* Richard D. Friedman, *An Asymmetrical Approach to the Problem of Peremptories*, 28 CRIM. L. BULL. 507, 517-19 (1992) (analyzing the "nonproblem of asymmetry" and emphasizing that "criminal trials are not about evenhandedness"); Robert Laurence, *The Bothersome Need for Asymmetry in Any Federally Dictated Rule of Recognition for the Enforcement of Money Judgements Across Indian Reservation Boundaries*, 27 CONN. L. REV. 979, 993-1001 (1995) (discussing the bothersome need for asymmetry more broadly than the title suggests). Another ground sometimes cited for limiting discovery by the defense is the fear that it would facilitate perjury and bribery or intimidation of witnesses. *See, e.g.*, *State v. Tune*, 98 A.2d 881, 884, 893 (N.J. 1953).

222. *See* DAMAŠKA, *supra* note 1, at 91-94.

223. Damaška spends some time on the much discussed issue of whether party-dominated or official-dominated factfinding systems are more likely to be accurate. He is uncertain about the answer, as am I, though we both tend to favor the systems of our native lands.

In describing the presentation of facts by parties, Damaška uses the nice metaphor of car headlights: two beams of light, narrow but presumably focused and intense. *See id.* at 92, 100. Is their illumination more likely to be useful than that from a diffuse source? I do not know for sure, but the question need not be asked with respect to factfinding in general. Instead, we are concerned principally with factfinding in party disputes—factfinding that usually has its primary impact on the two parties. In that limited context, it certainly seems plausible that narrowness of focus is a tolerable cost for intensity of illumination. Moreover, as I have pointed out, when the interests of others are involved, the common law system adjusts the two-party model to take their perspectives into account; the light available to the system is not limited to two beams. Note also my suggestion, *see supra* note 187, that at least in civil litigation the adversary system better internalizes costs and benefits.

224. FED. R. EVID. 611(a). Damaška emphasizes the common law tendency not to take testimony in narrative form. *See* DAMAŠKA, *supra* note 1, at 92-93. But there is a great deal of flexibility on this score. *See, e.g.*, FED. R. EVID. 611(a) advisory committee's note. Narrowly phrased questions, at least on direct examination, are not endemic to the system, and a party witness who wishes to tell her story without much lawyerly interruption is ordinarily given a chance to do so. Narrow questions often do have advantages,

reordering would interfere with the parties' ability to tell a story in a persuasive way. Such an ability is very important if the parties are to feel, at the end of the case, that they have had their "day in court."²²⁵ At the same time, as I noted above,²²⁶ this ability rests in tension with the right of the adversary to cross-examine promptly. Thus, for example, the extent to which cross-examination may go beyond matters raised on direct has long been a controversial matter in common law jurisdictions.²²⁷

Much the same can be said about the other principal common law departure from ordinary cognitive processes identified by Damaška, namely the passive factfinder. A factfinder, whether judge or jury, could be moderately active without endangering deep values of our system. Such activism would certainly have some benefits.²²⁸ But a greater degree of activism is likely to interfere with the parties' presentation of their own cases and give one side or the other the sense that it is facing an extra adversary.

I have argued that, to the extent that it makes sense to speak of the mission of the common law adjudicative system, that mission is the accurate determination of the rights of the parties, subject to various constraints. Prominent among those constraints are procedural rights of the parties that help to shape both evidentiary law and the adversary system in which it operates. Some of those rights would still have substantial force even in a system that does not depend on party control over the factfinding process.

IV. CONCLUSION: PROSPECTS FOR CHANGE

I have argued here that the common law evidentiary system is largely oriented around the protection of individual rights and related important values. I do not take a Panglossian view of the system, however: It could be improved very substantially. Indeed, much of the significant work of evidence scholars concerns ways in which the system might be altered, in ways large and small, conceptually or in practice. Of course, the system will change over time, whether for better or worse. It has always been in a process of continual

however, in avoiding irrelevancies or other testimony that should not be presented and in enhancing the focus and dramatic power of the testimony.

225. This factor may be an important part of the reason that parties appear to find an adversarial system preferable to an inquisitorial one. See John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271, 1287-88 & n.37 (1974).

226. See *supra* note 99 and accompanying text.

227. See FED. R. EVID. 611(b) advisory committee's note (summarizing the debate and concluding that "[t]he matter is not one in which involvement at the appellate level is likely to prove fruitful"); 1 MCCORMICK, *supra* note 45, § 21, at 83-86 (describing jurisdictions' different rules on the scope of cross-examination).

228. As Damaška perceptively points out, activism not only helps the factfinder absorb information, but also gives the parties a better understanding of what the "cognitive needs" of the factfinder are. See DAMAŠKA, *supra* note 1, at 96; cf. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 62 (1928) (stating, in a description of the receptivity of able appellate lawyers to questions from the court, that these lawyers "prefer an open attack to a masked battery").

change—in response to changes in institutions, technology, ideology, demographics, and other factors—and there is every reason to believe the process will continue. The Anglo-American system is, as Damaška points out, characterized by “great flexibility,”²²⁹ and so it is marked by steady, nondisruptive change. Damaška, however, argues that with the crumbling of the institutional pillars will come more disruptive change. I am rather skeptical.

Consider first what Damaška calls the “scientization of proof”²³⁰—that is, the growing importance of science and technology in proof. I believe Damaška overstates the significance and imminence of this phenomenon. For example, I suspect that before very long DNA evidence will have much the feel that evidence about radar guns, fingerprints, and photographs now has.²³¹ Where difficult issues remain, appellate decisionmaking will presumably continue to seek some degree of uniformity. Meanwhile, dissatisfaction with the way in which scientific evidence is gathered and presented will most likely continue to create pressure for change.²³² But the rights orientation of the Anglo-American system, I anticipate, will confine the extent of change: Any system that appears to deprive the litigants of their ability to present their sides through plausible-sounding experts whose views favor their own would almost certainly face insurmountable resistance.

Damaška also predicts an increase in what he calls “differentiation of the legal process”²³³—use of new or alternative forms of dispute resolution. He is probably right; indeed, he correctly points out that the change is already

229. DAMAŠKA, *supra* note 1, at 151-52. In a session devoted to discussion of *Evidence Law Adrift* at the recent Hastings Symposium on Truth and Its Rivals in the Law of Evidence at Hastings College of the Law, Sept. 26-27, 1997, my colleague Sam Gross made a valuable point cutting against the view that evidence law changes dramatically over time. Whereas American civil procedure of today would seem very foreign to a lawyer of a century ago, Gross pointed out, American evidence law would seem quite familiar; the Federal Rules of Civil Procedure created a mild revolution but the Federal Rules of Evidence left prevailing structures intact.

230. DAMAŠKA, *supra* note 1, at 145.

231. Scientific knowledge is expanding rapidly, of course. But there has always been a moving frontier of scientific knowledge that creates professional debate and stretches lay understanding, and a second level of scientific knowledge that is sufficiently accepted, at least by the understanding few, that its implications can be presented in easily digested form. DNA evidence now lies near the first frontier, and so it creates complexities for the adjudicative system. Evidence from radar guns, by contrast, is now well within the second level; I doubt that most jurors have a good understanding of how radar guns work, and we do not spend time informing them, but the underlying principles are not controversial and the consequences are readily understandable.

232. Damaška suggests that “[a] better way of conveying scientific data [than adversarial oral presentation] would be to prepare briefs that could carefully be studied by the trial judge in advance of the trial.” DAMAŠKA, *supra* note 1, at 146. The expert’s report required by the new FED. R. CIV. P. 26(a)(2)(B)—in jurisdictions that adhere to that rule—is a major step in that direction. For other interesting suggestions on how our system might better accommodate information from experts, see Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1208-30. The pressure for change is by no means limited to the Anglo-American system. Damaška writes that “the Anglo-American procedural environment is poorly adapted to the use of scientific information.” DAMAŠKA, *supra* note 1, at 147, and he may be right. There is some dissatisfaction in Europe, however, with the Continental system’s reliance on the scientific establishment, a concern acknowledged by Damaška. *See id.* at 150-51.

233. DAMAŠKA, *supra* note 1, at 147.

underway,²³⁴ and it seems likely to continue. Moreover, Damaška is probably right in suggesting that increased differentiation is a good thing.²³⁵ Recent developments in tobacco and asbestos litigation are a useful reminder that standard adversarial litigation is a clumsy tool, even in adapted form, to address mass torts.²³⁶ In many contexts, it is also a poor way to effect significant political adjustments.²³⁷ Nevertheless, even while recognizing that the needs of modern society put increasing emphasis on the "public interest" in litigation,²³⁸ we should not overmagnify the change. Common law litigation has always had an impact on persons other than the immediate parties, simply because it is how so much of our law is made. Indeed, some defenders of the adversary system, in particular of its aggressive American variant, have emphasized its role in providing a "desirable and orderly way of resolving disputes of broad public significance."²³⁹ And yet even today, and probably well into the next millennium, most workaday litigation has its primary impact on the parties and a narrow circle of others who are intimately connected to that litigation. It is both likely and desirable that, despite the increasing differentiation of procedural forms, the forms that emerge will continue to be constrained and largely shaped, as they have been for hundreds of years, by solicitude for the rights of those persons.

Finally, I have a similar reaction to one other significant change that I anticipate. I suspect that, at least outside the area of scientific evidence, the supposed cognitive disabilities of jurors will play less of a role in evidentiary rhetoric than they have over the last two centuries. Most obviously, as Damaška argues, this may occur because of continued shrinkage in the scope of litigation tried before a jury;²⁴⁰ evidentiary decisionmakers will likely continue to use the absence of the jury as the occasion for loosening exclusionary rules. Additionally, empirical research suggesting that jurors do

234. *See id.*

235. *See id.* at 147-49.

236. Whether or not the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), was justified, the very real difficulties that beset the proposed settlement involved there—and the fact that the Court rejected the settlement—are inescapable facts suggesting limitations on the usefulness of class actions in this realm. Similarly, the supposed comprehensive settlement by state attorneys general and several large tobacco companies is, in fact, a proposal for congressional action; of course, it is unlikely that the proposal would have been supported by the companies were it not for the pressure created by litigation.

237. Damaška cites Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 247-48, for "the difficulties of deciding environmental causes on the basis of information supplied by self-interested parties." DAMAŠKA, *supra* note 1, at 101 n.55.

238. *See DAMAŠKA, supra* note 1, at 137-38.

239. *NAACP v. Button*, 371 U.S. 415, 453 (1963) (Harlan, J. dissenting); *see also* FREEDMAN, *supra* note 201, at 18-20 (arguing that litigation expresses important public policies); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984) ("[Some see] adjudication in essentially private terms . . . I, on the other hand, see adjudication in more public terms: Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.").

240. *See DAMAŠKA, supra* note 1, at 126-27.

not fail to discount the weaknesses of evidence,²⁴¹ as well as analytical work like Damaška's suggesting that jurors' vulnerabilities are unlikely in most contexts to turn good evidence into bad,²⁴² may well persuade decisionmakers that many evidentiary restrictions should be loosened. In some settings, such a change would be all to the good. If removal of the cognitive smoke screen focuses decisionmakers' attention on the potentially stronger reasons supporting some evidentiary rules, that would be beneficial as well. But the opposite consequence is also possible. Decisionmakers may take the view that if they do not have to worry about cognitive disabilities of the factfinder, there is little reason remaining to exclude highly probative evidence.²⁴³ Such a reaction would be unfortunate. The common law system of evidence has a long tradition of constraining the search for truth in order to serve broad policy considerations, including, most notably, the rights of individuals. It does not always do so well or wisely, to be sure, and some of the underlying considerations change over time. But this orientation and individual rights that have enduring value are worthy anchors of our evidentiary system. We should not forsake them.

241. See *supra* note 31 and accompanying text.

242. See *supra* Subsection I.A.2.

243. I have in mind here particularly the question of whether an out-of-court statement should be excluded as a violation of the confrontation right. The Supreme Court has tended to view the right in this context as essentially a guarantor that "the trier of fact [will have] a satisfactory basis for evaluating the truth of the prior statement." *California v. Green*, 399 U.S. 149, 161 (1970). The more confident the court is in the trier of fact, therefore, the less it might be concerned about the confrontation right.